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Supreme Court, U.S.
FILED

07 1 2 8 8 APR 1 4 2008

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No. ____

IN THE

Supreme Court of the United States

DONALD CALLOWAY,
Petitioner,

v.

JESSE MONTGOMERY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the United States Court of Appeals for the Seventh Circuit incorrectly denied two claims that entitle petitioner Donald Calloway to habeas relief. Because the Seventh Circuit's holding on one claim conflicts with this Court's Sixth Amendment jurisprudence and its holding on the other claim conflicts with the holdings of six other circuit courts, these two issues plainly merit this Court's review. The questions presented are:

1. For purposes of sentencing enhancements imposed by a trial judge, does the Seventh Circuit's holding that the state appellate court could look to Mr. Calloway's federal mail fraud plea agreement to determine whether Mr. Calloway also could have been convicted of the completely different uncharged and unproven crime of theft by deception conflict with the Sixth Amendment's procedural safeguards against sentencing enhancements recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny simply because the mail fraud conviction qualified as a "prior conviction"?

2. Did the Seventh Circuit erroneously hold, in direct conflict with six other circuit courts, that in a non-capital case where the trial court failed to instruct the jury on a lesser included offense that was supported by the evidence, a defendant is not entitled to habeas relief even where (as here) the petitioner successfully demonstrated that a fundamental miscarriage of justice occurred because the petitioner was convicted of a crime he did not commit?

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PETITION FOR WRIT OF CERTIORARI.

Donald Calloway respectfully petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW.

The Seventh Circuit's opinion denying relief on the issues raised in this petition are reported at 512 F.3d 940 (Pet. App. 1-11a). The United States District Court for the Northern District of Illinois' opinion denying relief is published at 467 F. Supp. 2d 850 (Pet. App. 12-40a). The unpublished decision of the Illinois Appellate Court denying Mr. Calloway's direct appeal is reprinted at Pet. App. 41-57a.

STATEMENT OF JURISDICTION.

On January 14, 2008, the United States Court of Appeals for the Seventh Circuit denied Mr. Calloway habeas relief. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

This case involves the Fifth and Sixth Amendments to the United States Constitution which are reprinted at Pet. App. 103a.

STATEMENT OF THE CASE.

A. Mr. Calloway's Arrest and Statements to Law Enforcement Officials.

On December 6, 2001, Mr. Calloway was arrested for the alleged murder of his ex-wife, Margie Murray.[1] In the days following his arrest, Mr. Calloway gave two statements (one written and one verbal) to law enforcement officials. In each of those statements, Mr. Calloway told police officials that on the evening of March 20, 1979, Mr. Calloway and his ex-wife, Margie Murray, met at a bar on the south side of Chicago. They left together, drove around in Murray's van and parked. A conversation about a potential reconciliation became a heated argument. Ms. Murray pulled a gun, and it discharged during an ensuing struggle. Murray was shot and killed.

A grand jury subsequently returned an indictment containing eight (8) counts for murder, one count for armed robbery, two counts for aggravated kidnapping, one count for robbery, one count for kidnapping, one count for possession of a stolen motor vehicle, one count for aggravated unlawful restraint, one count for concealment of a homicidal death, and one count for unlawful restraint. Mr. Calloway pled not guilty and was tried before a jury.

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[1] Petitioner was charged with Murray's murder in 1979, but Petitioner was not arrested until 22 years later, in 2001.

B. The Illinois Trial Court Erroneously Refuses to Instruct the Jury on Involuntary Manslaughter.

Trial began on April 19, 2004. The State called eleven witnesses — none of whom were eye witnesses to Ms. Murray's death or otherwise contradicted Mr. Calloway's statements about what happened on the night of March 20, 1979. Indeed, the evidence at trial was largely undisputed. Consistent with Mr. Calloway's statements, the State's own evidence (through the testimony of a detective and Murray's daughter) showed that Murray owned multiple guns and carried a gun in her purse. The State's own evidence (through the testimony of Christmas and fire arms examiner) also verified Mr. Calloway's statement that the gun that killed Murray was a gun that she owned and kept in her purse.

Based on Mr. Calloway's statements (which the State introduced at trial) that the gun discharged during a struggle over the gun, Mr. Calloway requested that the jury be instructed on the lesser included offense of involuntary manslaughter. Mr. Calloway argued that based on his statements, the jury could find that Mr. Calloway acted recklessly. That request was denied.

On April 23, 2004, Mr. Calloway was acquitted of murder but convicted of the lesser included offense of voluntary manslaughter, a Class 2 felony under Illinois law.

C. The Illinois Trial Court Violates Mr. Calloway's Sixth Amendment Rights by Finding, Without the Assistance of a Jury, that Mr. Calloway's 2002 Federal Mail Fraud Conviction was "Akin to" Theft By Deception.

For sentencing and consistent with Illinois law, Mr. Calloway elected to be sentenced under the law in effect at the time of the offense. In 1979, under Illinois law, voluntary manslaughter was a Class 2 felony with a sentencing range of 3 to 7 years. Ill. Rev. Stat. 1979, ch. 38, par. 9-2(c) and par. 1005-8-1(a)(5).

Although the maximum Illinois statutory sentence for a Class 2 felony was 7 years imprisonment, on June 22, 2004, the trial judge found that Mr. Calloway was eligible for an extended-term sentence and sentenced Mr. Calloway to a term of twelve years in prison. The statute the Illinois court relied on to enhance Mr. Calloway's sentence provides:

> The following factors may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender who was at least 17 years old on the date the crime was committed: (1) When a defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater Class felony, within 10 years, excluding time spent in

> custody, and such charges are separately brought and tried and arise out of different series of acts.

Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3.2(b) For a Class 2 Illinois felony, the statute permitted a doubled sentencing range, from a 7 year maximum to a 14 year maximum if the State proved that one of the enhancing factors was present.

In Mr. Calloway's case, it was undisputed that he had not been convicted of any Illinois offense that qualified under Paragraph 1005-5-3.2(b). Instead, in seeking the enhancement, the State relied on Mr. Calloway's 2002 conviction for federal mail fraud, 18 U.S.C. § 1341 (Pet. App. 58a), in the United States District Court for the Northern District of Illinois. The State argued, and the trial court agreed, that Mr. Calloway's federal mail fraud conviction satisfied Paragraph 1005-5-3.2(b) because it was for "the same or greater Class felony" as his Class 2 voluntary manslaughter conviction.

For purposes of the enhancement statute, a "conviction" is defined as a "judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury," Ill. Rev. Stat. 1979, ch. 38, par. 1005-1-5, and has been construed by the Illinois courts to include consideration of federal convictions in Illinois federal courts where the Illinois state conviction and the Illinois federal conviction (on which the

enhancement was based) are for the same type of crime. Nothing in section 5-5-3.2(b)(1), however, defined the term "class" or indicates how a federal felony conviction should be classified for purposes of comparing whether that conviction is "the same or greater class" as the state law felony and no Illinois cases directly address this issue. Moreover, no contemporaneous legislative comments exist to place the section within its legislative context have been found.

The basic problem with the enhancement to Mr. Calloway's sentence is that federal law does not put felonies into classes, using Illinois' classification scheme or any other. Consequently, the Illinois courts were left to their own devices to determine whether the federal mail fraud conviction was a Class 2 or higher felony under Illinois law. The Illinois courts could not reach that conclusion by looking to Illinois" analogous mail fraud statute: that offense, with elements almost identical to those of the federal statute, is a Class 3 felony under Illinois law and would not have triggered an extended sentence for Mr. Calloway. Nor could the Illinois courts reach that conclusion by looking at the maximum penalty for Mr. Calloway's federal mail fraud conviction (5 years imprisonment), which was below the maximum penalty for a Class 2 felony under Illinois law (7 years imprisonment).

The State's only evidence of Mr. Calloway's 2002 federal mail fraud conviction was a copy of his pre-sentence investigation report, which showed that Mr. Calloway had been convicted of federal mail fraud.

The State did not call any witnesses. The State also did not introduce any other documentary evidence (for example, the indictment or guilty plea, both of which Mr. Calloway presented to the trial court *after* the unconstitutional sentence had been imposed) regarding the 2002 federal mail fraud conviction or the conduct which gave rise to that conviction. The State argued that Mr. Calloway was eligible for an extended sentence under Paragraph 1005-5-3.2(b) because Mr. Calloway's federal mail fraud conviction by itself showed that he *could have been* convicted of the uncharged crime of theft by deception under Illinois law, a Class 1 felony given the amount purportedly at issue.

Among other arguments, Mr. Calloway argued at sentencing (and on reconsideration)[2] that the Sixth Amendment and this Court's *Apprendi* jurisprudence entitled Mr. Calloway to formal charges and a jury trial on any assertion that the conduct underlying his federal mail fraud conviction also could have resulted in a theft by deception conviction under Illinois law.

The sentencing court rejected Mr. Calloway's arguments and sentenced Mr. Calloway to 12 years

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[2] Mr. Calloway made two other arguments to the trial court. First, Mr. Calloway argued that the trial court should look to the most analogous statute — the Illinois mail fraud statute, which had virtually identical elements to the federal mail fraud statute and classified mail fraud as a Class 3 felony. Second, Mr. Calloway argued that the court should look to the minimum and maximum penalties of the specific statutes to determine if mail fraud was a "same or greater" class felony.

imprisonment, five years higher than the statutory maximum for a Class 2 felony. The sentencing court found that based on his federal mail fraud conduct in Illinois, Mr. Calloway *could have been convicted* of a violation of Illinois state law against theft by deception (a Class 1 felony) if Mr. Calloway had been prosecuted for that crime in an Illinois state court (which he never was):

> First of all, I do find that this defendant is eligible for the extended term. I do find that the case in which the defendant pled guilty to and was sentenced in federal Court is akin to the theft statute, a Class 1 felony in the State of Illinois, albeit, named under a different statute.
>
> And the fact that – the fact that the circumstances could be dovetailed into more than one offense does [not] mean that it doesn't apply to the Class 1 felony in the State of Illinois.

D. Mr. Calloway's Direct Appeals Are Denied.

Mr. Calloway's conviction and enhanced sentence were affirmed in an unpublished order by the Illinois Appellate Court. On the trial court's failure to instruct the jury on the lesser included offense of involuntary manslaughter, the Illinois Appellate Court incorrectly held that there was no evidence that Mr. Calloway acted recklessly (a point that was later disputed by the District Court in Mr.

Calloway's habeas proceedings). On the *Apprendi* issue, the Illinois Appellate Court rejected Mr. Calloway's challenge to his sentence under the Sixth Amendment and *Apprendi* and held that the sentencing court was permitted to "compare the federal statute, under which the defendant was convicted, to an analogous statute in Illinois" or "similar crime in Illinois."

Mr. Calloway timely filed a petition for leave to appeal both of these issues to the Illinois Supreme Court. That petition was denied on December 1, 2005. On April 24, 2006, this Court denied certiorari review of Mr. Calloway's direct appeal.

E. Mr. Calloway Seeks Habeas Corpus Relief.

On June 13, 2006, Mr. Calloway filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois. After full briefing and oral argument, the Northern District of Illinois denied habeas relief in a published decision. (Pet. App. 12-40a.)

On Mr. Calloway's claim that the Illinois Appellate Court erroneously held that he was not entitled to an instruction on involuntary manslaughter, the District Court agreed that the Illinois Appellate Court erred, finding that Mr. Calloway's statements provided evidence of reckless conduct. However, applying the "miscarriage of justice" previously relied upon by the Seventh Circuit (as well as five other circuits), the District Court incorrectly concluded that the Illinois Appellate

Court's incorrect ruling did not amount to a fundamental miscarriage of justice.

On the *Apprendi* issue, the District Court held that no *Apprendi* violation occurred because Mr. Calloway's plea agreement in the mail fraud case contained "sufficient facts to satisfy the elements of theft by deception". (Pet. App. 25-26a.) In reaching this conclusion, the District Court rejected Mr. Calloway's argument that the Illinois courts should not have been reviewed the plea agreement to determine whether Mr. Calloway's mail fraud conviction was the equivalent of (or akin to) a hypothetical theft by deception conviction. Instead, the District Court found that this Court's opinion in *Shepard v. United States*, 544 U.S. 13 (2005) permitted the Illinois Appellate Court's *post hoc* review of Mr. Calloway's mail fraud plea agreement to determine the nature of Mr. Calloway's prior conviction. (Pet. App. 26-27a.)

F. The Seventh Circuit Denies Mr. Calloway Habeas Relief.

Mr. Calloway timely appealed to the United States Court of Appeals for the Seventh Circuit.

On the lesser included offense instruction claim, the Seventh Circuit rejected Mr. Calloway's argument that his claim should be evaluated under the "fundamental miscarriage of justice" test even though the Seventh Circuit had previously analyzed similar claims under that test. (Pet. App. 7-8a.) Instead, without discussing the reasons the court

was departing from the fundamental miscarriage of justice test under which the court previously analyzed similar claims, the Seventh Circuit held that habeas relief was *per se* inappropriate. Specifically, the Seventh Circuit held that because this Court's decision in *Beck v. Alabama* reserved judgment on the issue of whether the failure to instruct the jury on a lesser included offense raised due process concerns in a non-capital case, the Illinois Appellate Court's facially incorrect holding that Mr. Calloway was not entitled to an instruction on involuntary manslaughter was not contrary to clearly established federal law as determined by this Court.

On the *Apprendi* issue, the Seventh Circuit affirmed the District Court's ruling that under *Shepard*, the Illinois Appellate Court could look to Mr. Calloway's plea agreement and the theft by deception statute to determine whether Mr. Calloway's federal mail fraud conviction was the functional equivalent of a theft by deception conviction. (Pet. App. 9-10a.) Recognizing that certain members of this Court have called into question the continuing validity of the "fact of a prior conviction" exception, the Seventh Circuit noted in closing: "*Almendarez-Torres* still lives." (Pet. App. 10a.)

REASONS FOR GRANTING THE WRIT.

The Anti-Terrorism Effective Death Penalty Act ("AEDPA") governs review of Mr. Calloway's habeas claims. Under §2254(d)(1) of AEDPA, there are three situations in which a federal court must grant

a writ of habeas corpus: (1) if the relevant state-court decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States"; (2) if the state-court judgment "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States"; and (3) if the state court's ruling relied on an unreasonable determination of fact. 28 U.S.C. §§ 2254(d)(1) and (3). Mr. Calloway's habeas claims are brought under the first prong of AEDPA — the Illinois Appellate Court's decision was "contrary to . . . clearly established Federal law," as determined by this Court. This Court should grant certiorari and vacate the Seventh Circuit's judgment for three reasons.

First, the Seventh Circuit's ruling that the Illinois Appellate Court could look to Mr. Calloway's federal plea agreement for mail fraud to find that Mr. Calloway also could have been convicted of the completely different, uncharged crime of theft by deception stands in direct conflict with this Court's Sixth Amendment jurisprudence. Under *Apprendi* and its progeny, Mr. Calloway was entitled to a charging document and a jury trial on "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" other than "the fact of a prior conviction." Whatever the scope of that exception, it cannot, consistent with the Sixth Amendment, permit a sentencing court to enhance a sentence by concluding, without any evidence or a jury trial, that the conduct underlying the prior conviction "could" also have resulted in a conviction for a more serious but uncharged and unproven

crime. The Seventh Circuit's ruling ignores the fact that none of the procedural safeguards that form the basis of the "fact of prior conviction" exception were present in this case, including but not limited to the right to notice by way of an indictment of the crime for which Mr. Calloway was (purportedly) charged, the right to hold the government to its strict burden of proof beyond a reasonable doubt, or a trial by a fair and impartial jury of his peers on the crime of theft by deception.

Second, this case is an excellent vehicle for the Court's examination of the viability and scope of "the fact of a prior conviction" exception to *Apprendi*'s procedural safeguards. While in recent terms the Court has worked to clearly define the universe of sentencing schemes and determinations to which *Apprendi* safeguards attach, the deceptively simple "fact of a prior conviction" exception remains ill-defined. Given the tortuous way the courts have interpreted the exception, in Mr. Calloway's case and others, guidance from this Court is urgently needed. The straightforward facts of this case present an ideal opportunity for the Court to examine the limits that must be placed on the "fact of a prior conviction" exception to prevent its erosion of the core Sixth Amendment principles protected by *Apprendi* or, if the Court desires, whether the difficulties in implementing the exception preclude its continuing viability in light of *Apprendi*, *Blakely v. Washington*, 524 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005).

Third, this Court should grant review and resolve a three-way circuit split among the lower courts on the issue of whether the failure to instruct the jury on a lesser included offense that is supported by the evidence violates due process in a non-capital case: (1) five circuit courts have held that a petitioner is entitled to relief on a habeas claim involving the failure to give a lesser included offense instruction only if the petitioner can demonstrate that a fundamental miscarriage of justice occurred; (2) five circuits have held that *Beck* precludes habeas relief even if the petitioner can demonstrate a fundamental miscarriage of justice.; and (3) one circuit has examined these habeas claims under *Beck* and held that a petitioner does not need to demonstrate a fundamental miscarriage of justice.

I. The Court Should Grant Review To Correct The Seventh Circuit's Ruling That The Sentencing Court Could Find Without A Jury That Conduct Underlying Mr. Calloway's Federal Mail Fraud Conviction Could Also Have Resulted In An Illinois Theft By Deception Conviction Because The Seventh Circuit's Ruling Is In Direct Conflict With This Court's Sixth Amendment Jurisprudence.

Whatever the continuing validity of the "prior conviction" exception, it cannot be broad enough to permit the sentencing court to impose an extended term on Mr. Calloway without a jury finding that the earlier mail fraud conduct amounted to the crime of Class 1 theft by deception. That determination cannot be made by a judge as a legal — as opposed to

factual —determination because, on their face, the elements of the federal mail fraud statute and Illinois' theft by deception are not identical or even basically coextensive; they are different offenses with different elements. *Compare* 18 U.S.C. § 1341 (Pet. App. 58a) *with* 720 ILCS 5/16-1(a)(2) (2004) (Pet App. 60-61a). As just one example, while the theft by deception statute requires that the jury find beyond a reasonable doubt that the defendant obtained "by deception control over property of the owner," there is no such element of a federal mail fraud conviction, which only requires using the mails "for the purpose of" executing a scheme or artifice or attempting to do so. *Id.*; *accord People v. Riner*, 234 Ill. App. 3d 733, 736, 600 N.E.2d 1308, 1310 (Ill. App. Ct. 1992). As a consequence, the "fact of" Mr. Calloway's federal mail fraud conviction does not legally establish all of the elements of Illinois" theft by deception beyond a reasonable doubt.

Mr. Calloway had a Sixth Amendment right to a jury trial to determine whether the conduct underlying his prior mail fraud conduct also violated Illinois" theft by deception statute. "[O]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also Booker*, 543 U.S. at 229-35. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority." *Blakely v.*

Washington, 542 U.S. 296, 304 (2004). This does not apply, in the words of Apprendi, to the "fact of a prior conviction," and that is because of the "the certainty that procedural safeguards attached to any "fact" of prior conviction . . . ." *Apprendi*, 530 U.S. at 490. But the "fact of prior conviction" here is the fact that Mr. Calloway was convicted of federal mail fraud – not the different crime, with plainly different elements, of violating Illinois" theft by deception statute.

Because Mr. Calloway's conviction was for mail fraud, the proceedings in the Illinois federal court did not provide any "procedural safeguards" to protect Mr. Calloway from being convicted of any crime other than mail fraud. As this Court said in *Jones v. United States*, 526 U.S. 227, 329-30 (1999):

> The Court's repeated emphasis on the distinctive significance of recidivism leaves no question that the Court regarded that fact as potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing . . . One basis for that possible constitutional distinctiveness is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.

Jones, 526 U.S. at 329-30. But those guarantees did not apply to the de facto conviction – the sentencing judge's conclusion that Mr. Calloway was also guilty of violating Illinois' theft by deception statute – used to enhance Mr. Calloway's sentence here. Instead, the sentencing court alone was (in essence and effect) allowed to convict Mr. Calloway of an uncharged, untried crime without any evidence of the underlying conduct, and without affording Mr. Calloway his Sixth Amendment right to a trial by jury unambiguously required by the holdings of this Court. If the Appellate Court's rationale is allowed to stand, it opens the door, for example, to the imposition of an extended term where a defendant pleads guilty to (or is even simply charged with) robbery but who, the State contends without evidence, "could have been convicted" of armed robbery.

Furthermore, the Seventh Circuit's reliance on *Shepard*, as the basis for the trial court's ability to make "determinations as to whether the conviction qualifies the defendant for a sentencing extension" is fundamentally misplaced. Pet. App. 16a (emphasis added). In *Shepard*, this Court, effectively deciding an issue of statutory interpretation under the Armed Career Criminal Act, held that a sentencing court is "generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 30-31; *see also United States v. Cantellano*, 430 F.3d 1142, 1147 (11th Cir. 2005) ("*Shepard* was not a

constitutional decision [but rather] an issue of statutory interpretation.").

In this case, the indictment and guilty plea were not provided by the State at sentencing, but by Mr. Calloway (to show that the maximum penalty for Mr. Calloway's federal mail fraud conduct was not as severe as a Class 2 felony in Illinois) after sentencing, and were not relied on by the sentencing court to impose sentence. And although the Illinois Appellate Court cited the plea agreement in affirming Mr. Calloway's sentence, the entire exercise in which the court engaged – whether Mr. Calloway could have also been convicted of a more serious crime than that to which he pleaded (Pet. App. 73-87a) – was not authorized by "the fact of a prior conviction" exception, because that fact here was a conviction for federal mail fraud, not violation of Illinois" theft by deception statute. The Appellate Court's order also makes clear that, even if that were the test, the facts recited in the plea agreement do not establish all of the elements of theft by deception; the court was left to conclude that those facts could have resulted in a theft by deception conviction on an accountability theory. (Pet. App. 56a.) That is not an enhancement permitted by the "fact of a prior conviction" exception currently recognized by this Court.

The Seventh Circuit's reliance on *Shepard* is even more fundamentally misguided because a plurality of this Court specifically held in *Shepard* that sentencing judges without juries should not be permitted to make disputed findings about the basis

of a plea in the guise of the "fact of a prior conviction" exception:

> Instead, the sentencing judge considering the [Armed Career Criminal Act] enhancement would (on the Government's view) make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea, and the dispute raises the concern underlying *Jones* and *Apprendi*: the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the state, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of potential sentence. While the disputed fact here [–whether prior burglary convictions involved burglary of a building or enclosed space –] can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute.

Shepard, 544 U.S. at 25 (emphasis supplied). *Accord Jones v. United States*, 526 U.S. 227, 249 (1999) (a prior conviction, unlike any other factor used to enhance a sentence, must itself have been

established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees); *Apprendi*, 530 U.S. at 547 ("One important purpose of the Sixth Amendment's jury trial guarantee is to protect the criminal defendant against potentially arbitrary judges.") (O"Connor, J. dissenting).

Moreover, regardless of how the Illinois courts chose to label their findings (*i.e.*, as "determinations"), "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 585, 602 (2002) *citing Apprendi*, 530 U.S. at 482-83 (emphasis supplied). As Justice Scalia stated in *Ring*:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

Id. at 610 (Scalia, J. concurring).

Here, that the sentencing court's approach was akin to resolving a factual dispute and would cause arbitrary results is underscored by the rejection of the other methods of assessing his federal mail fraud

conviction that Mr. Calloway offered, but the sentencing court rejected without discussion. First, Mr. Calloway argued that the sentencing court was required to look to the most analogous state statute – the Illinois statute for mail fraud with virtually identical elements. Second, Mr. Calloway argued in the alternative that the "class" of the federal felony should be judged by how the maximum penalty for that felony would place it in Illinois" classification system. The sentencing court rejected both arguments without explanation, and instead held that because the underlying conduct "could" be a theft by deception under Illinois law, it triggered an enhanced sentence. On appeal, while the Illinois Appellate Court held that the sentencing court's method was permissible, the court did not conclude that the other perfectly "reasonable" methods of making the determination offered by Mr. Calloway – either with the directly analogous Illinois mail fraud statute or by considering the maximum penalty for the federal mail fraud conviction – would have been improper. Thus, the determination of what Illinois felony class was most analogous was essentially left to the subjective evaluation of the sentencing judge, something the concerns underlying *Apprendi* and *Shepard* seek to eliminate, and this Court specifically condemned in *Blakely*:

> Did the court go too far in any of these cases [affirming enhancements]? There is no answer that legal analysis can provide. With too far as the yardstick, it is always possible to disagree with

> such judgments and never to refute them.

Blakely, 542 U.S. at 308 (emphasis in original).

Two additional possibilities demonstrate the constitutional danger of the analysis in which sentencing courts would be authorized to engage under the Illinois courts" reasoning (*i.e.*, that the sentencing court should be permitted to determine the whether a prior conviction for one crime was the functional equivalent of another crime by analogy, without a jury). The first possibility is that a court would be permitted to impose an extended term based on any Illinois conviction (no matter how minor), as long as there was some other qualifying felony, with some (but not all) similar elements, with which the defendant hypothetically could have been charged. The danger in this approach is fully demonstrated in this case, where the sentencing court heard no evidence, and made no element-by-element comparison of the offenses, but imposed an extended term essentially based on the court's overall sense that there were sufficient similarities in the offenses that the theft by deception crime *could have been* charged.

Even more troubling, the sentencing court could engage in this kind of analysis only for federal convictions, and not Illinois convictions, where the prior conviction "speaks for itself." This approach would unfairly and arbitrarily discriminate against those whose prior conviction was in federal court. Moreover, the danger in this approach is

demonstrated by what happened here: there was a directly analogous Illinois crime, which the court ignored and disregarded, and the court instead used "gut feeling" jurisprudence to find (without any evidence) that the conduct at issue in the federal case could also have resulted in a conviction for a completely different, and more serious, felony under Illinois law. This position is unfair, arbitrary, and directly contrary to this Court's controlling precedent, from *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) through *Shepard*. The Court should grant certiorari review to right this wrong.

II. The Court Should Grant Review To Address The Viability And Scope Of "The Fact Of A Prior Conviction" Exception.

This case presents a unique opportunity to re-evaluate the continuing validity of *Almendarez-Torres"* fact of a prior conviction exception. *See Rangel-Reyes v. United States*, 547 U.S. 1200 (2006) (Thomas, J., dissenting from the denial of certiorari) ("Moreover, it has long been clear that a majority of this Court now rejects [the fact of a prior conviction] exception."); *see also Almendarez-Torres*, 523 US. at 248-49 (Scalia, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting). Although it may be true, as Justice Stevens noted in the denial of certiorari in *Rangel-Reyes*, that "the denial of a jury trill on the narrow issues of fact concerning a defendant's prior conviction history . . . will seldom create any significant risk of prejudice to the accused," this case illuminates the fundamental problem in allowing the prior conviction exception to *Apprendi* to stand.

Here, the Illinois trial court took one crime (mail fraud) and arbitrarily dovetailed it into a completely different uncharged, untried and unproven crime (theft by deception) under the guise of the fact of a prior conviction exception. As the examples discussed above readily demonstrate (*supra* at 22-23), this unprecedented step in criminal sentencing jurisprudence unconstitutionally broadens a sentencing court's ability to impose sentencing enhancements under recidivist statutes with virtually unfettered discretion. This unconstitutional development in Sixth Amendment jurisprudence greatly oversteps the much narrower power that this Court granted sentencing courts in *Almendarez-Torres* and *Sheppard*.

Furthermore, the Seventh Circuit's reasoning here is symptomatic of the difficulty courts across the United States have had reconciling *Almendarez-Torres*' "fact of a prior conviction" exception with the implications of *Apprendi* and its progeny. This difficulty has led, in a short period of time, to divergent judicial practices that in the main continue to erode the Sixth Amendment rights guaranteed under *Apprendi*.

In the adult criminal justice sphere, numerous courts have held that "the fact of a prior conviction exception" permits judges without juries to resolve bona fide disputes about the identity of the person who was previously convicted, even when that person used various aliases, or when fingerprint evidence is required. *See, e.g., United States v. Browning*, 436 F. 3d 780, 781-82 (7th Cir. 2006) (defendant who

uses multiple aliases was not entitled to a jury trial on the issue of identity); *United States v. Garcia-Rodriguez*, 127 Fed. Appx. 440 (10th Cir. 2005) (judge may determine the fact of a prior conviction by considering fingerprint and photographic evidence); *United States v. Carrillo-Beltran*, 424 F.3d 845 (8th Cir. 2005) (judge may properly consider fingerprint evidence). While these courts have held that the quintessential factual issue – the identity of the defendant – was subject to determination without a jury, other courts have held that factors more akin to legal conclusions flowing from "the fact of a prior conviction" may not be determined by a judge without a jury. For example, in *United States v. Kortgaard*, 425 F.3d 602, 609 (9th Cir. 2005), the court held that the determination of the defendant's likelihood of recidivism is a factual matter that does "not follow necessarily from the fact of any prior conviction or sentence but instead call[s] for the judgment of a factfinder." And in *State v. Henderson*, 706 N.W.2d 758, 762 (Minn. 2005), the court held that the sentencing judge violated the Sixth Amendment when he determined without a jury that the defendant had a "pattern of criminal conduct" because that determination went "beyond a mere determination as to the fact, or number, of the offender's prior convictions."

In the juvenile criminal sphere, the division is even more palpable. Some lower courts have concluded that prior juvenile criminal convictions rendered without a jury cannot be determined by a judge under "the fact of a prior conviction" exception. *United States v. Tighe*, 266 F.3d 1187 (9th Cir. 2001)

(declining to apply fact of a prior conviction exception to defendant's nonjury juvenile convictions); *State v. Harris*, 339 Ore. 157 (Or. 2005) (lower court's use of prior nonjury juvenile conviction to enhance defendant's sentence violated defendant's Sixth Amendment rights); *Washington v. Tagaloa*, No. 04-1-03162-8 SEA (Wash. Sup. Ct. Apr. 15, 2005) (holding that juvenile proceedings may not be used to enhance a sentence because procedural safeguards at such adjudications are sufficient for purposes of rehabilitation, but not for punishment). Other courts have reached the opposite conclusion, holding that prior juvenile convictions can be determined by a judge without a jury. *See Ryle v. State*, 2005 Ind. LEXIS 1112 (Ind. 2005) (holding that *Apprendi* permits a court to enhance a sentence based on juvenile convictions and probation status); *State v. Deters*, 163 Ohio App. 3d 157 (Ohio Ct. App. 2005) (holding that juvenile adjudications do fall within the prior conviction exception and stating that divergent views on this issue should be reconciled).

Although there is confusion in applying the exception, we could find no case raising the kind of issue Mr. Calloway's case raises. Specifically, we could find no reported case in which the state courts sanctioned the kind of subjective analysis employed here – of equating a federal crime to a different state crime in order to fall within "the fact of a prior conviction" exception.

Consequently, the straightforward – but unusual – facts in Mr. Calloway's case, combined with the clearly unconstitutional and unjust sentence imposed

on Mr. Calloway, make this case an ideal opportunity to examine "the fact of a prior conviction exception," either to revisit its viability or to clarify its scope. The Court may determine, either because it is inconsistent with the principles underlying *Apprendi* (*see Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring)), or because this case is an excellent demonstration that drawing the lines between "the fact of a prior conviction" and "the facts of a prior conviction" is unworkable in practice, that the exception should be abandoned. Alternatively, the Court may use this case to restore the constitutional permissibility of the exception by limiting it to circumstances where the application of the enhancing statute can be determined mechanically, and without the exercise of any judicial "analogizing" – whether it be called "factfinding" or something else.

Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements." *Shepard*, 544 U.S. at 38 (Thomas, J. concurring in part and concurring in the judgment). Mr. Calloway is one of them. In addition to preventing the imposition of additional sentences in clear violation of the Sixth Amendment, this Court's guidance now will assist the state and federal legislatures in determining how to refine recidivist components of sentencing systems, which are "a traditional, if not the most traditional, basis for a

sentencing court's increasing an offender's sentence." *Almendarez-Torres*, 523 U.S. at 243.

Mr. Calloway respectfully urges this Court to hear this case to clarify "the fact of a prior conviction" exception for the courts, the legislatures, and criminal defendants.

III. In Holding That Mr. Calloway Could Not Seek Habeas Relief On The Illinois Appellate Court's Ruling that Mr. Calloway Was Not Entitled to an Involuntary Manslaughter Instruction, The Seventh Circuit Rejected The Fundamental Miscarriage of Justice That Five Other Circuits Have Employed To Evaluate Similar Claims And A Circuit Split Furthered.

The Seventh Circuit also rejected Mr. Calloway's habeas claim that the Illinois Appellate Court's ruling that Mr. Calloway was not entitled to an involuntary manslaughter instruction violated clearly established federal law as determined by this Court. Notably, the Seventh Circuit did not dispute that District Court's finding that there was sufficient evidence to warrant instructing the jury on involuntary manslaughter. Instead, the Seventh Circuit held that the Illinois Appellate Court's ruling did not violate clearly established federal law as determined by this Court because in *Beck v. Alabama*, 447 U.S. 625, 638 (1979), where this Court found that the failure to instruct the jury on a lesser included offense in a *capital* case violated due process, but declined to decide whether the failure to

give a lesser included offense instruction in a non-capital case violates due process.

By focusing exclusively on *Beck*, the Seventh Circuit completely ignored another area of this Court's jurisprudence. Specifically, one of the rights of criminal defendants under the due process clause of the Fourteenth Amendment is to be tried according to the fundamental contemporary norms of civilized procedure. *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937). As this Court has explained, "since habeas corpus is, at its core, an equitable remedy, a court must adjudicate even [ ] claims when required to do so by the ends of justice." *Schlup v. Delo*, 513 U.S. 289, 299 (1995). To ensure the miscarriage of justice exception would remain rare, this Court has explicitly tied this exception to cases where (as here) the petitioner "is innocent of the *charge for which he is incarcerated.*" *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (emphasis added).

Indeed, in the absence of direct guidance from this Court regarding whether a non-capital defendant's due process rights are violated where the trial court refuses to instruct the jury on a lesser included offense that is supported by the evidence, the circuit courts have employed three vastly different approaches to deciding this important Constitutional issue. ***First***, the Third Circuit has applied and extended *Beck* to claims involving lesser included offense instruction and held that a habeas petitioner may seek relief *without* having to show that a fundamental miscarriage of justice occurred. *Vujosevic v. Rafferty*, 844 F.2d 1023, 1027 (3rd Cir.

1988). ***Second*** (and at the opposite end of the spectrum), the Second, Fifth, Ninth, and Eleventh Circuits (as well as the Seventh Circuit in this instant case) all have held that the absence of a lesser included offense instruction in a non-capital case raises no federal due process issue and therefore, habeas relief is never available. *Jones v. Hoffman*, 86 F.3d 46, 48 (2d Cir.1996); *Valles v. Lynaugh*, 835 F.2d 126, 127 (5th Cir. 1988); *James v. Reese*, 546 F.2d 325, 327 (9th Cir. 1976); *Perry v. Smith*, 810 F.2d 1078, 1080 (11th Cir. 1987). ***Third***, the First, Fourth, Sixth and Tenth Circuits have held that a petitioner raising lesser included offense claims is entitled to habeas relief only if he can show that a miscarriage of justice occurred. *See Bates v. Lee*, 308 F.3d 411, 418 (4th Cir. 2008); *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990); *Tata v. Carver*, 917 F.2d 670, 671-72 (1st Cir. 1990); *Trujillo v. Sullivan*, 815 F.2d 597, 603 (10th Cir. 1987); *De Berry v. Wolff*, 513 F.2d 1336, 1338 (8th Cir. 1975).[3]

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[3] Indeed, the Seventh Circuit's holding that Mr. Calloway was not entitled to habeas relief is especially unjust because for years before and after the passage of AEDPA, the Seventh Circuit consistently reviewed similar claims under the miscarriage of justice test. *See Charlton v.* Davis, 439 F.3d 369, 375 (7th Cir. 2006) (Post-AEDPA); Armstead *v. Frank*, 383 F.3d 630, 632 (7th Cir. 2004) (Post-AEDPA); *Reeves v. Battles*, 272 F. 3d 918, 920 (7th Cir. 2001) (Post-AEDPA); *Everette v. Roth*, 37 F.3d 257, 262 (7th Cir. 1993) (Pre-AEDPA); *Nichols v. Gagnon*, 710 F.2d 1267, 1269 (7th Cir. 1983) (Pre-AEDPA). Although the Seventh Circuit recognized its previous case law (all of which was decided after *Beck*), it did not explain why it was suddenly departing from more than 20 years of jurisprudence. (Pet. App. 7-8a.)

This case demonstrates precisely how a miscarriage of justice can occur if the defendant is deprived of a lesser included offense instruction that was supported by the evidence and why this Court should grant review and resolve the split among lower courts. In Mr. Calloway's statements to police officials (which were introduced at trial by the State), Mr. Calloway said that Ms. Murray was killed as a result of a gun discharging during a struggle between Mr. Calloway and Ms. Murray. At trial, the State argued that Mr. Calloway's statements were a fabrication and that he intentionally shot and killed Ms. Murray. Mr. Calloway, however, argued throughout the trial that Ms. Murray's death was the result of a tragic accident. In light of the fact that there were no eyewitnesses (other than Mr. Calloway), the jury's deliberations were limited to: (1) rejecting Mr. Calloway's statements entirely and convicting Mr. Calloway of first-degree murder; (2) believing Mr. Calloway's statements and acquitting him of murder and any lesser included offense; and (3) believing some (but not all) of Mr. Calloway's statements.

The fundamental problem is that the only verdict that would have allowed the jury to find a "middle ground" between the State's theory (murder) and Mr. Calloway's theory (acquittal) was a crime for which there was absolutely no evidence to support – voluntary manslaughter. Under Illinois law, voluntary manslaughter occurs when a person *intentionally* kills another, but the defendant "believed the circumstances to be such that they justified the deadly force he used, but his belief that

such circumstances existed was unreasonable." Ill. Rev. Stat., Ch. 38, par. 9-2(b) (1979) (Pet. App. 66a).

But there was no evidence whatsoever that Mr. Calloway intentionally did anything. Mr. Calloway never claimed that he intentionally shot Ms. Murray in order to save his own life, that he intentionally struggled with Ms. Murray or that he intentionally pointed the gun away from himself and at Ms. Murray.

To the contrary, Mr. Calloway's statements paint a distinct picture of a struggle that happened in a matter of seconds, with no time to form the intent to do anything, let alone act pursuant to a specific intent. From those statements, the jury could have concluded that Mr. Calloway acted recklessly in any number of ways including:

- in failing to get out of the van as the argument escalated and became physical;
- in producing the gun (denied by Calloway, but argued by the State);
- in struggling over a loaded weapon;
- in failing to attempt to discard or unload the weapon;
- in being intoxicated while struggling over a loaded weapon (Calloway consumed at least two

beers before getting in Murray's van);

- in struggling with a smaller woman over a loaded weapon;
- in causing the loaded weapon to be pointed at Murray during the struggle;
- in somehow obtaining control of the loaded weapon and causing it to be pointed at Murray;
- in struggling in such a way to make the gun likely to discharge;
- in causing the gun to discharge during the struggle;

– or any number of other ways.

Thus, the Illinois Appellate Court clearly got it exactly backwards, and Mr. Calloway was convicted of a crime that he clearly did not commit, and the jury was deprived of considering the only crime – involuntary manslaughter – that was the "middle ground." Under this Court's jurisprudence, Mr. Calloway's wrongful conviction plainly constitutes a fundamental miscarriage of justice. *Kuhlmann*, 477 U.S. at 452 (a miscarriage of justice occurs where the petitioner "is innocent of the *charge for which he was incarcerated*") (emphasis added); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("we think that in an extraordinary case, where a constitutional violation

has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

Moreover, the Illinois Appellate Court's clear error does not just affect Mr. Calloway's constitutional rights as a criminal defendant – it affects the integrity of the entire judicial system and the public's faith and confidence in that system. As this Court has made clear, in a criminal case the powerful interest in the "fair administration of criminal justice" is necessary to protect the "very integrity of the judicial system". *See Clinton v. Jones*, 520 U.S. 681, 704, n.39 (1997); *Tehan v. United States*, 382 U.S. 406, 464-65 (1966) ("the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'"); *see also Barnes v. United States*, 412 U.S. 837, 850 (1973) (Douglas, J., dissenting) ("The use of presumptions and inferences to prove an element of the crime is indeed treacherous, for it allows men to go to jail without any evidence on one essential ingredient of the offense. It thus implicates the integrity of the judicial system."); *Gelbard v. United States*, 408 U.S. 41, 67 (1972) (Douglas, J., concurring) ("nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.")

The miscarriage of justice doctrine exists to protect both a defendant's constitutional rights and the public's confidence in the integrity of the judicial system. This Court cannot allow a defendant's constitutional rights and the public's trust to be eroded, especially where (as here) a federal district court has already concluded that the Illinois Appellate Court reached the wrong conclusion and allowed Mr. Calloway to be convicted of a crime he could not have committed. This Court should grant review, resolve the split among lower courts and correct Mr. Calloway's unconstitutional conviction.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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April 14, 2008

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APPENDIX

Appendix A

United States Court of Appeals
for the Seventh Circuit

Donald CALLOWAY, Petitioner-Appellant,
v.
Jesse MONTGOMERY, Respondent-Appellee.

No. 07-1148

Argued September 28, 2007
Decided January 14, 2008

Before ROVNER, WOOD, and EVANS, Circuit Judges.

EVANS, *Circuit Judge*. If a 42-year-old man wants to change his identity and fly through the remainder of his life under the radar screen with a fake name, what kind of name would he be likely to select? Certainly he would want a common name, like Walker, Washington, White, or Williams,[1] to name just a few that begin with the same letter. But Donald Calloway, the appellant in this federal habeas case, did not follow the conventional wisdom:

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[1] How popular are these four names? Well, the National Football League alone has 11 players named either White or Walker on current team rosters. A dozen players are named Washington. And there are 39 players with "Williams" on the back of their jerseys each weekend. See NFL.com.

his newly adopted name (in 1979) was Robert Ducks.[2] Twenty two years later, after "Robert Ducks" was indicted in federal court, "Donald Calloway" came back from the past. And it was quite a past.

In March of 1979, Calloway left a bar with his ex-wife, Margie Murray. The next day Murray's dead body was found behind an abandoned house in Harvey, Illinois. The bullet fragments investigators found in her skull came from a .32 caliber handgun later found in her home. A little later, her van turned up in Houston, Texas. Calloway disappeared into thin air, and an arrest warrant was issued for him in April of 1979.

In 2001,[3] "Robert Ducks" was indicted in federal court in Chicago on mail fraud charges. While the case was pending, but apparently after "Ducks" appeared in court a few times, a fingerprint check indicated that he was not who he claimed to be. In

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[2] At least Donald Calloway also changed his first name, as "Donald Ducks" was apparently even too much for him. And, just to go back to the last footnote, there are no players in the NFL named either Duck or Ducks.

[3] It's a bit unnerving to consider just how much time passed between March of 1979, when Calloway disappeared, and December of 2001, when "Robert Ducks" was unmasked. In March of 1979, Jimmy Carter was the president, and the "Iran Hostage Crisis," which was to last 444 days, was still 8 months away. That was followed by the 8-year administration of President Reagan, the 4-year term of President George Herbert Walker Bush (#41), the 8-year presidency of Bill Clinton, the election of George W. Bush (#43) as president, and September 11, 2001, a day that changed America. That's a lot of time indeed.

fact, he was Donald Calloway. After the Harvey, Illinois, police were notified, Calloway was arrested and charged with the murder of Ms. Murray. Originally, "Ducks" denied that he was Calloway. Later, he admitted his true identity. He also gave two inconsistent statements to the police. But in both, he claimed that Murray pulled a gun from her purse, that a struggle followed, and that the gun discharged, hitting Murray. At Calloway's state murder trial, Dr. Shaku Teas testified as to the autopsy she performed on Murray's body. She found no stippling, i.e., "specks of gun powder embedded in the skin," which she said meant that the shot was fired from at least one foot away. She also testified that the angle of the gunshot was not consistent with a struggle. On the other hand, Calloway's expert said that a wig Murray wore might have prevented stippling and that the evidence was not inconsistent with a struggle. The jury rejected the murder charge but convicted Calloway on a lesser charge of voluntary manslaughter.

In the federal case against him, which was resolved before the state charge was tried, Calloway entered a guilty plea to mail fraud. The mail fraud conviction played a role in his sentencing in state court for manslaughter. The state trial judge held that the federal mail fraud conviction was equivalent to an Illinois conviction for theft by deception, which made Calloway eligible for an extended sentence. The maximum sentence for voluntary manslaughter, without the extension, was 7 years. With it, the

maximum increased to 14 years. He received a sentence of 12 years.

On his direct appeal from the voluntary manslaughter conviction, Calloway argued, among other things, that the trial court violated his due process rights by refusing to instruct the jury on involuntary manslaughter[4] and violated his Sixth Amendments rights-as clarified by *Apprendi v. New Jersey*, 530 U.S. 466 (2000)-by determining that his federal mail fraud conviction was equivalent to an Illinois conviction for theft by deception. The state appellate court rejected his claims and affirmed the conviction and sentence. The Illinois Supreme Court denied leave to appeal and the United States Supreme Court denied certiorari.

Calloway then filed the present petition for a writ of habeas corpus. The district court denied the petition but granted a certificate of appealability. In his appeal, he again claims that the state jury should have been instructed on involuntary manslaughter and that his rights under *Apprendi* were violated because the judge, not the jury, made the findings underlying the extended sentence.

Under the Antiterrorism and Effective Death Penalty Act of 1996, Calloway can obtain relief in federal court only if the decision of the state court was "contrary to, or involved an unreasonable

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[4] The maximum sentence for involuntary manslaughter was 5 years, but 10 years if an extension were deemed to be appropriate.

application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *28 U.S.C. § 2254(d)(1) and (2).* A state court decision is "contrary to" clearly established federal law if the court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if the court "decides a case differently than [the Supreme Court] has done on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 405 (2000); *Bell v. Cone*, 535 U.S. 685, 686 (2002). A decision of a state court which correctly identifies a governing legal rule established by the Court, but applies it unreasonably to the facts of a particular case, qualifies as a decision involving an unreasonable application of clearly established Federal law.

At first glance, it might seem as if the meaning of "clearly established law" should be self-evident and well-established, but even a brief look at a few cases shows it is not. For instance, last term the Court divided 5 to 4 in two Texas death penalty cases over the issue of what exactly was clearly established as to jury consideration of mitigating evidence. *See Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007), and *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007). The majority found that in both cases, the law regarding the presentation of mitigating evidence was clearly established. Chief Justice Roberts, dissenting in both, did not see the Court's prior

precedents as clear at all. He thought the Court gave itself "far too much credit in claiming that our sharply divided, ebbing and flowing decisions in this area gave rise to 'clearly established' federal law." *Abdul-Kabir*, at 1676; *Brewer*, at 1715.

Relevant to the present case are discussions of how far principles of clearly established law can be extended. In determining whether a juvenile was in custody for *Miranda* purposes, the court of appeals had relied on the Supreme Court's emphasis on the importance of juvenile status in other contexts and concluded that youth should be a factor in the *Miranda* analysis. *Alvarado v. Hickman*, 316 F.3d 841 (9th Cir. 2002). Over three dissents, the Court rejected that attempt to meld two lines of cases into clearly established law. *Yarborough v. Alvarado*, 541 U.S. 652 (2004). More recently, *Carey v. Musladin*, 127 S. Ct. 649 (2006), involved a state court decision which held that buttons displaying the victim's image, worn by the victim's family during trial, did not deny the defendant his right to a fair trial. The court of appeals determined that the state court decision was contrary to clearly established law set out in *Estelle v. Williams*, 425 U.S. 560 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986). *Musladin v. Lamarque*, 427 RM 653 (2005). The Supreme Court disagreed. The issue in *Williams* involved requiring a defendant to wear prison clothing at trial, and in *Flynn*, at issue was the presence of four uniformed state troopers immediately behind the defendant. These cases, the Court explained, did not provide clearly established law for Musladin's claim because

both involved "state-sponsored courtroom practices" and that, on the other hand, the "spectator conduct" to which Musladin objected was "an open question in our jurisprudence." Justices Stevens, Kennedy, and Souter wrote separate concurrences in which each found the opinion's view of clearly established law to be overly restrictive.

It is in this context that we consider whether there is clearly established Supreme Court precedent for Calloway's claim that he was entitled to a jury instruction on the additional (recall, the jury already had one lesser offense option on the table) crime of involuntary manslaughter. We find there is not. It is true that in *Beck v. Alabama*, 447 U.S. 625 (1980), the Court concluded that the defendant was entitled to such an instruction. However, *Beck* was a capital case, and in a footnote the Court said, "We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case." At 638 n.14. Throughout the decision it is clear that the risk of a wrongful conviction for a capital crime informed the result. The risk "cannot be tolerated in a case in which the defendant's life is at stake." At 637. "[D]eath is a different kind of punishment .." *Id.*, quoting *Gardner v. Florida*, 430 U.S. 349, 357 (1977).

Even though, as Calloway points out, we have previously analyzed this issue by looking at whether the omission of the instruction resulted in a

fundamental miscarriage of justice,[5] we now find that the *Beck* footnote requires us to conclude that on this issue in a noncapital case, there is no clearly established Supreme Court precedent.

Our conclusion is in accord with out recent decision in *Lockhart v. Chandler*, 446 F.3d 721 (7th Cir. 2006), in which we considered whether the state court violated petitioner's due process rights by failing to notify him before he entered a guilty plea that a mandatory 3-year term of supervised release would be added to his sentence. We found that there was no Supreme Court precedent on the issue and that, to the contrary, the Court had "expressly declined to decide such an issue in the very similar context of parole." At 724. The Court has also declined to consider lesser-included offenses in noncapital cases, such as this one.

Calloway's second claim is that his Sixth Amendment rights, as set out in *Apprendi*, were violated by the use of the federal mail fraud conviction to impose an extended sentence. In 1979, the time of the crime, Calloway's voluntary manslaughter conviction carried a maximum sentence of 7 years. Ill. Rev. Stat. 1979, ch. 38, par. 9-2(c) and par. 1005-8-1(a)(5). Under Illinois law, the sentence could be extended if a "defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater class

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[5] *See Reeves v. Battles*, 272 F.3d 918 (7th Cir. 2001); *Armstead v. Frank*, 383 F.3d 630 (7th Cir. 2004); and *Charlton v. Davis*, 439 F.3d 369 (7th Cir. 2006).

felony, within 10 years ...." Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3.2(b). Voluntary manslaughter was a Class 2 offense. His sentence could be extended only for a prior conviction for a Class 2 or Class 1 felony. Calloway's sentence was extended from 7 to 12 years based on his conviction for federal mail fraud, which the court found to be the equivalent of the Illinois Class 1 felony-theft by deception.

He argues that because federal felonies are not divided into classes as are felonies under Illinois law, it was improper to use the mail fraud conviction as a basis for extending his sentence. Essentially, he says that under *Apprendi* he was entitled to a jury determination as to whether a federal mail fraud offense is the equivalent of an offense under the Illinois theft by deception statute. The Illinois Court of Appeals rejected his argument, and, on this issue as well, we must determine whether the court's decision was an unreasonable application of Supreme Court precedent.

In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court determined that 8 U.S.C. § 1326(b)(2), which provides for the imposition of a higher sentence on an unlawfully returning alien who has a prior conviction, was a penalty provision. Because the provision did not create a separate crime, the government was not required to charge the fact of the earlier conviction in the indictment. Then came *Apprendi*, which determined that facts, other than the fact of a prior conviction, which increase the penalty for a crime beyond the

prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The recognition of the exception for a prior conviction kept *Almendarez-Torres* alive. In *Shepard v. United States*, 544 U.S. 13 (2005), the issue was what the trial judge could use to determine whether a burglary charge was for generic burglary-that is, burglary committed in an enclosed space-and thus would be a violent felony for purposes of the *Armed Career Criminal Act, 18 U.S.C. § 924(e).* The Court concluded that the enquiry made by the judge was limited to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." At 26.

The Illinois Appellate Court correctly stated and applied these principles in analyzing whether the mail fraud conviction was the equal of a conviction under Illinois law for theft by deception. The court looked to the statute and the plea agreement. It then properly looked to Illinois law to examine whether the facts would provide a basis for a charge of theft by deception. Because Illinois law specifically provides that a federal conviction that occurred in Illinois may be used to extend a sentence, *see People v. Harden*, 113 Ill. 2d 14 (1986), the court determined that there was no error in the use of the mail fraud conviction to extend Calloway's sentence. And in making this determination, the court did not run afoul of *Apprendi*. *Almendarez-Torres* still lives.

For these reasons, the judgment of the district court is AFFIRMED.

Appendix B

In the United States District Court
for the Northern District of Illinois.
Eastern Division.
Donald CALLOWAY, Petitioner,
v.
Ken BARTLEY, Respondent.

No. 06 C 3241

December 15, 2006

MEMORANDUM OPINION AND ORDER

Margie Murray died as a result of a gunshot on March 20, 1979. On December 6, 2001, Petitioner Donald Calloway was arrested and subsequently charged with murder in connection with Ms. Murray's death. Mr. Calloway pled not guilty and was tried before a jury in the Circuit Court of Cook County. On April 23, 2004, Mr. Calloway was convicted of voluntary manslaughter. The Circuit Court found Mr. Calloway eligible for an extended-term sentence, thereby sentencing him to a term of twelve years in prison. Mr. Calloway, currently in the custody of Ken Bartley, Warden of Pinckneyville Correctional Center, seeks relief under 28 U.S.C. § 2254(d)(1).

Mr. Calloway has exhausted his state court remedies as required under § 2254(b). The grounds on which

Mr. Calloway presently seeks relief have been duly raised before the trial court and Illinois appellate courts. Mr. Calloway first asserts error, in violation of the Sixth Amendment and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by the trial court's imposition of an extended sentence as a result of a prior federal conviction. Specifically, Mr. Calloway takes issue with the trial court's finding that the conduct underlying a prior federal conviction gave rise to a theft by deception conviction under Illinois law. Second, Mr. Calloway challenges the trial court's refusal to instruct the jury on the lesser included offense of involuntary manslaughter, as a violation of the Due Process clause.

I.

It is undisputed that on the evening of Ms. Murray' s death on March 20, 1979, she and Mr. Calloway, her ex-husband, met at a bar. They later left together and entered Ms. Murray's van, where Ms. Murray died of a gunshot. Mr. Calloway disposed of the victim's body and then fled to Texas. After some time passed, Mr. Calloway returned to Chicago and lived under the assumed name of Robert Ducks until 2001, when he was charged in a federal mail fraud scheme. He pled guilty to federal mail fraud in November 2001. After entering into the plea agreement, Mr. Calloway's identity and outstanding arrest warrant, in connection with Ms. Murray's death, were discovered. He was arrested by the Harvey Police Department ("HPD").

Mr. Calloway does not dispute that he shot Ms. Murray; his claim is that this was the result of a struggle. At trial, the State presented evidence of two statements made by Mr. Calloway to police. The first was a written statement given on December 7, 2001, which was destroyed by Mr. Calloway's then-wife, Renee Ducks, who was present at the interview. HPD Detective William Martin testified he reviewed the statement before it was destroyed, and that it described a verbal confrontation with Ms. Murray inside the vehicle, which turned into a physical confrontation. Ms. Murray then pulled a gun from her purse and when Mr. Calloway attempted to take the gun it went off, shooting her in the head. The second statement was videotaped on December 8, 2001. Mr. Calloway similarly described an escalating confrontation, during which Ms. Murray pulled a gun from her purse which he tried to wrestle from her. As they continued to struggle, the gun fired while pointing at Ms. Murray. On both occasions, the State was free to interview Mr. Calloway at length and as it deemed necessary; Mr. Calloway did not exercise his right to have an attorney present.

The State's evidence consisted of Mr. Calloway's two statements to police, an expert forensic pathologist, and ten fact witnesses. The expert forensic pathologist, Dr. Shaku Teas, testified that the distance from which the shot that killed Ms. Murray was fired was "probably over a foot," because there was no stippling (specks of gun powder embedded in the skin) near the wound. Dr. Teas also testified

Ms. Murray did not have any bruising on her body, particularly on her wrists or hands. The remainder of the State's witnesses were not present in the van at the time of Ms. Murray's death or otherwise purported to personally know what had happened inside the van. These were: Frederick Morris, who saw Mr. Calloway and Ms. Murray leave the bar together on the evening of her death; (2) Frederick Joseph, the HPD detective who investigated Ms. Murray's death in 1979; (3) David J. Brundage, a ballistics expert; (4) Zakary T. Freeze, the probation officer that conducted the pre-sentence investigation in Mr. Calloway's 2001 federal mail fraud conviction; (5) Joseph D. Thomas, the sergeant in charge of the HPD detective division at the time of Mr. Calloway's arrest in 2001; (6) Molly K. Perryman, the victim's sister; (7) Jessica Christmas, the victim's daughter; (8) Barbara Revelle, the HPD officer in charge of the evidence lock up; (9) William Martin, the HPD investigator who interviewed Mr. Calloway upon his arrest in 2001; and (10) Assistant State's Attorney Shawn Concannon, who took Mr. Calloway's videotaped statement.

The defense presented two fact witnesses and an expert witness at trial. One witness, Ken Scott, testified Ms. Murray carried a gun in her purse. The other witness was detective Thomas, who was re-called by the defense, and testified the HPD conducted no further investigation after Mr. Calloway gave the videotaped statement. The expert witness, forensic pathologist Dr. Larry Blum, testified that the direction of the wound track, the

lack of stippling, autopsy report, death certificate, and morgue photographs were not inconsistent with Mr. Calloway's statements of a struggle.

After the jury returned its verdict of voluntary manslaughter, the trial court relied on Mr. Calloway's prior federal conviction to impose an extended sentence of 12 years.[1] Voluntary manslaughter had a sentencing range of three to seven years. Ill. Rev. Stat. 1979, ch. 38, par. 9-2(c) and par. 1005-8-1(a)(5). The facts surrounding Mr. Calloway's prior conviction are at issue here and must be examined. The federal indictment laid out a mail fraud scheme in which Mr. Calloway (charged as Robert Ducks) was alleged to be one of six real estate agents who assisted in buying and selling property on behalf of a company called Easy Life. Easy Life purchased and rehabilitated properties, and defendant solicited buyers for these properties. When a potential buyer did not qualify for a mortgage, Mr. Calloway made misrepresentations to the United States Department of Housing and Urban Development ("HUD"), which in reliance on those misrepresentations provided mortgages and mortgage insurance to otherwise unqualified buyers. Mr. Calloway's plea agreement set forth the maximum statutory sentence of five years and that his sentence under the U.S. Sentencing Guidelines

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[1] Mr. Calloway elected to be sentenced under the law in effect at the time of the offense. Therefore, the trial court imposed the extended sentence under the 1979 Illinois Uniform Code of Corrections, Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3.2(b)(1).

(without a downward departure for cooperating with federal investigators) was 30 months imprisonment.

II.

Petitioner faces a steep burden under § 2254(d)(1). Habeas corpus relief cannot be awarded to a state prisoner when a state court simply misapplies established constitutional principles to the facts of the case. 28 U.S.C. § 2254(d)(1)(1996); *Williams v. Taylor*, 529 U.S. 362, 389 (2000). Relief is available only when the state court determination was "contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). For a state court's decision to be reviewable because it is "contrary to" clearly established federal law, the decision must be "substantially different" from the relevant Supreme Court precedent; "the word 'contrary' is commonly understood to mean 'diametrically different' or 'mutually opposed." *Williams*, 529 U.S. at 405. A state court decision is contrary to Supreme Court precedent if it contradicts that decision or reaches a different result on facts that are materially indistinguishable. *Id.* at 413. In assessing whether a state court decision involves "an unreasonable application of . . . clearly established" federal law, the question is "whether the state court's application of federal law was objectively unreasonable." *Id.* at 409. The Supreme Court has stressed that "the most important point is that an unreasonable application of federal law is different from an incorrect

application of federal law." *Id.* at 410 (emphasis omitted).

Section 2254(e) (1) also provides for great deference to the fact-finding of the trial court, stating: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State shall be presumed to be correct. The application shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

A. Imposition of An Extended Sentence

Mr. Calloway argues the trial court erred in imposing an extended sentence of 12 years for his voluntary manslaughter conviction. The trial court based the extended sentence on his prior federal conviction for mail fraud, which it found to be analogous to the crime of theft by deception under Illinois law. According to Mr. Calloway, the trial court made improper factual findings that increased his sentence beyond the statutory maximum and that are directly contrary to *Apprendi*. 530 U.S. at 490.

On September 9, 2005, the Appellate Court of Illinois, First Judicial Circuit, issued an unpublished order affirming Mr. Calloway's conviction and sentence. *People v. Donald Calloway*, No. 01 CR 031608, slip. op. (Ill. App. Ct. Sept. 9, 2005). The court reviewed petitioner's *Apprendi* claim and found

the sentence was proper. It held that in finding "the fact of a prior conviction," a court may make determinations as to whether the conviction qualifies a defendant for a sentencing extension without implicating *Apprendi*. *People v. Donald Calloway*, slip. op. at 15 (citing *Shepard v. United States*, 544 U.S. 13, 16 (2005)). Thus, although classified differently, a federal conviction could be used to extend Mr. Calloway's sentence in Illinois so long as the trial court found it was the "same or greater class felony" as voluntary manslaughter, a Class 3 felony. *Id.* at 12. Where the amount at issue exceeds $100,000, theft by deception is classified as a Class 1 felony. 720 ILCS 5/16-1(b)(6). Therefore, a theft by deception conviction in Mr. Calloway's case, where the amount at issue was approximately $132,000, qualified as a same or greater class felony as voluntary manslaughter. *Id.* at 11. The court also rejected the argument that the trial court's approach required a resolution of a factual dispute. *Id.* at 14-15. It found the facts contained in Mr. Calloway's federal plea agreement sufficiently established the elements of the crime of theft by deception. *Id.* at 15-16. Citing Mr. Calloway's plea agreement, the court concluded that while the facts showed that the buyers, and not Mr. Calloway, obtained the mortgages and insurance from HUD, he was still an active participant in the successful scheme to defraud HUD. *Id.* Finally, the court rejected the argument that the trial court was required to apply the Illinois mail fraud statute instead of theft by deception. The court held it was not bound to do so under any identifiable legal authority. *Id.* at 16-17.

A court relying on the "fact of a prior conviction" as a reason for imposing an extended sentence may do so without proof beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. The Supreme Court has held there is no right to a jury trial to determine whether a defendant should receive an enhanced sentence as a recidivist. *Almendarez-Torres v. United States*, 523 U.S. 224, 227 (1998). The scope of this exception to the Sixth Amendment right to a jury trial has been recently examined by the Supreme Court, in a context similar to the one presented by Mr. Calloway's situation, in *Shepard*, 544 U.S. at 13. This was the case cited by the Illinois appellate court. In *Shepard*, the district court had the task of determining how to classify a previous state conviction for purposes of sentencing under the Armed Career Criminal Act ("ACCA"). ACCA mandates a minimum 15-year prison sentence for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies. *Id.* at 15. In that case, the defendant's prior conviction arose from his plea of guilty to violating a Massachusetts burglary statute that criminalized trespassing not only into buildings and structures, but also into boats and motor vehicles. *Id.* at 16. In contrast, only burglaries committed in a building or enclosed space ("generic burglary"), not in a boat or a vehicle, were recognized as "violent felonies" under ACCA. *Id.* at 15-16. Therefore, the issue arose because the Massachusetts statute criminalized conduct that went beyond "generic burglary" under ACCA and none of the charging documents or admissions incident to Shepard's guilty

plea indicated the specific nature of the burglary under the statute. The Supreme Court held that a court "determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id.* at 16.

The Court in *Shepard* indicated it was troubled by the Sixth Amendment implications of allowing the sentencing court to conduct an evidentiary inquiry beyond the materials it had just deemed permissible. *Id.* at 24-25; *see also id.* at 27-28 (Thomas, J. concurring). The holding in *Shepard* was intended to ensure that a defendant was "necessarily" convicted of a generic burglary, *id.* at 24, and restricted the trial court from engaging in factfinding about the particulars of a defendant's conduct that are "too much like the findings" deemed impermissible under *Apprendi*. *Id.* at 25. Justice Thomas concurred, wanting to overrule the entire "fact of a previous conviction" exception as provided in *Almendarez-Torres*. *Id.* at 28.

In the instant case, although the trial court did not initially consider the plea agreement in determining Mr. Calloway's sentence, petitioner concedes it presented the court with the plea agreement in its motion for reconsideration. Therefore, it was before that court prior to Mr. Calloway's sentence becoming final and appealable. The appellate court also had available the plea agreement and cites its contents in

its decision in *People v. Donald Calloway*, slip. op. at 5. *See Charlton v. Davis*, 439 F.3d 369, 374 (7th Cir. 2006) (citing *McFowler v. Jaimet*, 349 F.3d 436, 446 (7th Cir. 2003) (under § 2254 courts must review the decision of the last state court to rule on the merits of petitioner's claim)). Accordingly, I must decide whether the determination that Mr. Calloway's plea agreement supported a theft by deception conviction, and hence an extended sentence,[2] is "contrary to, or an unreasonable application of" *Apprendi*.

Petitioner first argues that the plea agreement does not support a theft by deception conviction; therefore the trial court necessarily had to find additional facts in order to make its determination. In relevant part, the plea agreement provides:

> Robert Ducks (a.k.a Donald Calloway), and other persons both known and unknown to the Grand Jury, devised, intended to devise, and participated in a scheme and artifice to defraud and to obtain money and property from HUD and the Lenders, by means of materially false and fraudulent pretenses, representations, and promises well-knowing at

[2] Although the trial court imposed the extended sentence under the 1979 Illinois Uniform Code of Corrections, because Mr. Calloway's federal mail fraud conviction did not take place until 2002, the determination of whether that crime constituted a "same or greater class felony" was conducted in relation to the 2002 criminal code and classification of felonies. Mr. Calloway argued in favor of this. Furthermore, Illinois mail fraud, argued by Mr. Calloway to be the appropriate Illinois counterpart to federal mail fraud, was not codified as an offense in Illinois until 2000.

the time that the pretenses, representations, and promises were false when made.

. . . .

Although many of the buyers did not legitimately qualify for a mortgage, defendant Ducks provided the buyers with cash or money orders in order to assist the buyers in misrepresenting their qualifications for a mortgage. . . . After defendant Ducks gave the money to the buyers or their friend/relative, defendant Ducks instructed the buyers to withdraw the money from the relative's account and place the money in their own account. Finally, defendant Ducks instructed the buyers to return the money to Easy Life to be used as part of the down payment at the time of closing.

. . . .

Defendant Ducks and his co-defendants submitted these fraudulent Gift Letter/Affidavits to the Lenders and the Gift Letters/Affidavits became a part of the closing packages for the buyers. The defendants knew that the Lenders and ultimately HUD relied on the misrepresentations in the Gift Letters/Affidavits in determining whether to issue and/or insure a mortgage for the buyer.

Because of the misrepresentations to the Lenders and HUD made and caused by defendant Ducks regarding the source of the buyers' gifts, the Lenders and HUD provided

> mortgages and mortgage insurance to buyers who would otherwise be unqualified for such mortgages and mortgage insurance. . . .
>
> HUD has suffered a loss due to default or foreclosure on certain properties sold by defendant Ducks. Accordingly, the amount of loss attributable to defendant Ducks is $132,868.

(Plea Agreement at 2-4.)

Theft by deception occurs when a person knowingly "[o]btains by deception control over property of the owner." 720 ILCS 5/161(a)(2). "Obtain" is defined as follows: "[i]n relation to property, to bring about a transfer of interest or possession, whether to the offender or to another." 720 ILCS 5/15-7(a). There is also a statutory definition for "obtains control," which states "the phrase 'obtains or exerts control' over property, includes but is not limited to the taking, carrying away, or the sale, conveyance, or transfer of title to, or interest in, or possession of property." 720 ILCS 5/15-8. On the face of the statute, the relationship between these two statutory definitions is unclear. However, the Illinois Supreme Court has identified the elements of this crime as: "(1) the victim was induced to part with money; (2) the transfer of the money was based upon deception; (3) defendant intended permanently to deprive the victim of the money; and (4) defendant acted with specific intent to defraud the victim." *People v. Kotlarz*, 193 Ill. 2d 272, 299, 738 N.E.2d 906, 919 (2000) ; *see also People v. Rohlfs*, 322

Ill.App.3d 965, 970, 752 N.E.2d 499, 502-03 (4th Dist. 2001) (examining statutory definition of "obtain" and not "obtains control" in determining a sufficiency challenge to a theft by deception conviction). Therefore, as determined by the Illinois courts, the applicable statutory definition appears to be that of "obtain."[3]

Mr. Calloway's plea agreement contains sufficient facts to satisfy the elements of theft by deception as set forth by the Illinois Supreme Court. The victim in this case, HUD, was induced to part with money by providing unqualified buyers with mortgages. The plea agreement states that "[b]ecause of the misrepresentations to the Lenders and HUD made and caused by defendant [Calloway] regarding the source of the buyers' gifts, the Lenders and HUD provided mortgages and mortgage insurance to buyers who would otherwise be unqualified for such mortgages and mortgage insurance." (Plea Agreement at 4.) The mortgages were based upon deception; Mr. Calloway provided the unqualified buyers with cash or money in order to assist the buyers in misrepresenting their qualifications for a mortgage. (*Id.* at 3.) Mr. Calloway knew these buyers were unqualified "because their income and assets were too low to qualify for a mortgage." (*Id.*) Mr. Calloway also admitted to intending to "defraud and to obtain money and property from HUD and the Lenders, by means of materially false and fraudulent pretenses, representations, and promises well-

[3] Petitioner has not provided any contrary authority.

knowing at the time that the pretenses, representations and promises were false when made." (*Id.* at 2.) Finally, "HUD suffered a loss due to default or foreclosure on certain properties sold by defendant." (*Id.* at 4.) Accordingly, petitioner's argument that the sentencing court necessarily had to find additional facts, specifically that Mr. Calloway obtained control over the property in order to enhance Mr. Calloway's sentence, must fail in light of the elements of theft by deception as set forth by the Illinois Supreme Court, and the contents of the plea agreement.

Alternatively, petitioner argues that it was improper for the court to look at the plea agreement in the first place, regardless of whether it contains sufficient facts for a theft by deception conviction. However, this is not "contrary to or an unreasonable application of" the law as presently articulated by the Supreme Court.[4] As in *Shepard*, this case involved a determination of the nature of Mr. Calloway's prior conviction. Despite the uncertainty surrounding the classification of the prior conviction in *Shepard*, the Supreme Court did not find a Sixth Amendment violation or that the defendant was entitled to a jury trial on that issue. *Shepard* held that a "collateral trial" on that issue was not worth conducting. *Shepard*, 544 U.S. at 23; *see also United States v. Browning*, 436 F. 3d 780, 782 (7th Cir. 2006) (examining *Shepard*).

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[4] Although the validity of *Almendarez-Torres* has been called into question, it remains good law today.

Accordingly, the state courts' reliance on the plea agreement to determine the nature of Mr. Calloway's prior conviction, along with its counter-part under Illinois law, was not "contrary to or an unreasonable application of" *Apprendi* in light of *Shepard* and the continuing validity of *Almendarez-Torres*. *See United States v. Pittman*, 418 F.3d 704, 709 (7th Cir. 2005) ("Even post-Booker . . evidence of a prior conviction that would increase the statutory maximum does not need to be submitted to a jury"); *see also United States v. Carrillo-Beltran*, 424 F.3d 845, 848 (8th Cir. 2005) (rejecting argument that "nature of a prior conviction is to be treated differently from the fact of a prior conviction"); *United States V. Moore*, 401 F.3d 1220, 1225 (10th Cir. 2005) (classification of felony as "violent" is "a question of law and not fact, the Sixth Amendment does not require that determination to be made by a jury"). Mr. Calloway, therefore, is not entitled to relief under § 2254 on this claim.

B. Involuntary Manslaughter Instruction

Mr. Calloway also argues the trial court erred by failing to instruct the jury on the lesser included offense of involuntary manslaughter. Under the law in Illinois in 1979, involuntary manslaughter is committed when a person, without lawful justification, unintentionally kills an individual by performing acts that are likely to cause death or great bodily harm, and these acts are performed recklessly. Ill. Rev. Stat. 1979, ch. 38, par. 9-3(a). A person acts recklessly when "he consciously

disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, . . . and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." Ill. Rev. Stat. 1979, ch. 38, par. 4-6. The trial court rejected the instruction stating there was an absence of evidence of recklessness, as required by the Illinois involuntary manslaughter statute.

The appellate court affirmed, finding that Mr. Calloway "was justified in struggling with Murray in order to protect himself after Murray drew a weapon," and therefore his actions were not reckless. *People v. Calloway*, slip op. at 8. The court relied on *People v. Castillo*, 188 Ill. 2d 536, 723 N.E. 2d 274 (1999). There, a jury convicted the defendant of murder after testimony that the defendant and the victim initially engaged in a struggle inside of a bar. The two were separated and the defendant later called the victim outside of the bar, where the struggle resumed. Two eye witnesses said they saw the defendant point the gun at the victim from a distance of 10 or more feet and then shoot twice, striking the victim once. The Illinois Supreme Court found, on the record before it, there had been no evidence of recklessness before the trial court. Therefore the defendant was not entitled to an involuntary manslaughter instruction. The court rejected the argument that defendant's testimony "that he struggled with the victim after the victim drew a gun and threatened to injure him" was evidence of recklessness. Instead, the court found it

was "evidence that defendant acted with regard to a justifiable risk of injuring the victim in order to protect himself." *Id.* at 541.

In the Seventh Circuit, a failure to include an instruction on a lesser included offense does not violate the Constitution unless it amounts to a fundamental miscarriage of justice. *Armstead v. Frank*, 383 F.3d 630, 632 (7th Cir. 2004) (omission of a lesser included instruction may implicate Sixth and Fourteenth Amendment rights if resulting conviction violates due process); *Robertson v. Hanks*, 140 F.3d 707, 710 (7th Cir. 1998) (citing *Nichols v. Gagnon*, 710 F. 3d 1267, 1269 (7th Cir. 1983)). A fundamental miscarriage of justice occurs from a failure to tender an instruction when "credible evidence in the record would support a verdict based on [the lesser included] instruction." *Wilson v. McCaughtry*, 994 F. 2d 1228, 1238 (7th Cir. 1993) (quoting *Taylor v. Gilmore*, 954 F.2d 441, 451 (7th Cir. 1992)); *United States ex rel. Reeves v. Battles*, No. 99 C 1613, 2000 WL 1466201, at *4 (N.D. Ill. Aug. 30, 2000) (Gettleman, J.). "At a minimum, petitioner must show that there was 'unequivocally strong' evidence in the record by which a jury could have found each element of the proposed instruction, and that the other evidence does not disqualify him from using the proposed defense." *Id.* (quoting United States ex rel. *Peery v. Sielaff*, 615 F.2d 402, 402 (7th Cir. 1979)). A showing that the trial court should have given the instruction as a matter of state law is not enough; a petitioner must demonstrate that had the omitted instruction been

given, it is improbable that he would have been convicted of the greater offense. *See Everette v. Roth*, 37 F.3d 257, 262 (7th Cir. 1993); *Nichols*, 710 F.3d at 1269. As a practical matter, this last inquiry appears to be a challenge to the sufficiency of the evidence. *See, e.g., Robertson*, 140 F.3d at 711 ("[petitioner] does not challenge the sufficiency of the evidence which the jury found established beyond a reasonable doubt his guilt for dealing cocaine.").

Mr. Calloway's case presents a truly troubling set of circumstances. The record provides that Mr. Calloway has consistently maintained he engaged in a struggle with Ms. Murray over a gun. First, Detective Martin testified Mr. Calloway's first written statement provided:

> he had met his wife in the Family Den in Chicago, and they had left the Den in her van, and a confrontation, verbal confrontation they had within the vehicle, which turned in a physical confrontation, and that she pulled a gun from her purse, and he attempted to take the gun from her and the gun went off, striking her in the head.

(Trial Tr. April 21, 2004 at 48.) Second, Mr. Calloway's videotaped statement provided:

> Q. What, if anything, happened after that and during the argument?
> A. I, I explained to Margie how miserable things were, you know, and she, she made a comment to something

about, I'll put you out of your misery and reached into her purse and pulled out a weapon.

Q. Do you remember where her purse was?

A. No, I don't remember exactly where it was.

Q. When she pulled out that gun what did she do with it?

A. She pointed it at me and waved it several times.

Q. Do you remember what the gun looked like?

A. No.

Q. Do you remember what Margie's purse looked like?

A. No.

Q. Had you ever seen Margie with a gun before?

A. No, not, not to - - not that I can remember.

Q. Now, you said that Margie pointed the gun, where was she pointing the gun?

A. Directly at me.

Q. What did you do?

A. I, I argued with her for, I guess, for a couple of seconds and then reached and grabbed the gun and tried to take it away or turn it away from me.

Q. Where did you touch the gun?

A. I, I imagine I touched the gun on the barrel and the, and the hand or over her hand holding the grip.
Q. And what did you do? How did you try to get it away?
A. I, I immediately tried to turn it away from me towards, the front of the van, towards the window.
Q. And were you successful?
A. Yes.
Q. Okay. What happened with the gun then?
A. We continued to struggle and eventually the, the weapon ended up pointing at Margie and it discharged.
Q. And it discharged. Where did it hit Margie?
A. In the head, I think.
Q. Okay And do you know how that gun discharged?
A. No.
Q. Okay. After the gun discharged what did you do?
A. I panicked and started screaming and hollering and I tried to reach to see if there was any pulse or anything on Margie.

(Pet. Exh. 2 at 8-10.) These statements constitute the only pieces of direct evidence in the case, the remaining case was circumstantial.

Mr. Calloway's statements are "credible evidence" that would support a finding of recklessness and an involuntary manslaughter verdict. According to his statement, Mr. Calloway and Ms. Murray had been arguing when Ms. Murray initially drew the gun in the van, pointed it at him "and waved it several times." In neither statement, however, does Mr. Calloway state he was afraid for his life or that he felt justified in struggling for the gun, or that he intended to even point the gun at or shoot the victim. Struggling over a gun, in the absence of justification, has been found to be reckless. *See People v. Roberts*, 265 Ill.App.3d 400, 403, 638 N.E.2d 359, 361 (111. App. Ct. 1994); *People v. Robinson*, 163 Ill.App.3d 7541 516 N.E.2d 1292 (Ill. App. Ct. 1987). The remaining physical and testimonial evidence at trial did not disqualify Mr. Calloway from arguing involuntary manslaughter. The physical evidence in this case was limited to the autopsy findings, as described by Dr. Teas in her testimony, and the evidence concerning the gun and bullet. Dr. Teas' testimony concerning the autopsy report provided that Ms. Murray died as a result of a gun shot wound to the head, the bullet entering the right temple area above the victim's right ear. During the autopsy, Dr. Teas recovered a large bullet fragment from the left side of the brain and a small bullet fragment in tissue just underneath the entrance wound. (Trial Tr. April 21, 2004 at 97-98.) Although she did not include this observation in the original autopsy report, Dr. Teas also testified she did not see any stippling near the victim's wound and, therefore, believed the distance between the gun and the victim

was "probably over a foot." (*Id.* at 102.) Similarly, she also testified the wound track was at "a tiny bit or upward angle," possibly of 10 or 20 degrees, which was also not listed in the autopsy report. (*Id.* at 103.)

The larger bullet fragment recovered during the autopsy was tested, and it was determined that it was shot by a .32 caliber handgun owned by Ms. Murray. This gun had been tested in 1979. After that, the gun and both bullet fragments were lost while in police custody and could never be re-tested. The gun was never tested for fingerprints, nor were the victim's hands tested for residue analysis to determine whether her hands had been on the gun at the time of discharge. Mr. Calloway's account of a struggle is not precluded by any of this evidence. The determination that it was Ms. Murray's gun that discharged actually corroborates Mr. Calloway's statement.

The verdict reveals the jury found Mr. Calloway's statements credible, despite the State's argument that this was a cold-blooded execution. Although charged with first degree murder, Mr. Calloway was convicted of voluntary manslaughter. In order to reach this verdict, the jury was first instructed:

> To sustain either the charge of murder or the charge of voluntary manslaughter, the State must prove the following propositions.
> First proposition.

> That [ ] the defendant performed the acts which caused the death of [the victim] and,
> Second proposition.
> That when the defendant did so, he intended to kill or do great bodily h[a]rm to [the victim] or,
> He knew that such acts would cause death to [the victim], or,
> He knew such acts created a strong probability of death or great bodily harm to [the victim],
> And third proposition.
> That the defendant was not justified in using the force which he used.
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, your deliberation should end and you should return a verdict of not guilty.

(Trial Tr. April 22, 2004 at 183.) The first proposition was not in dispute in this case. The second proposition has three options, the baseline being that "he knew [the acts which caused the death of the victim] created a strong probability of death or great bodily harm." The final proposition was that Mr. Calloway was not justified in his actions. Consistent with this final proposition, the jury rejected Mr. Calloway's self-defense claim. This instruction provided: "a person is justified in the use of force which is intended or likely to cause death or

great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm." (*Id.* at 182.)

The jury was also instructed that it could find "a mitigating fact exists so as to reduce the offense of murder to the lesser offense of voluntary manslaughter." (*Id.* at 181.) Mr. Calloway had "the burden of proving beyond a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of voluntary manslaughter instead of murder." (*Id.* at 184.) The jury was instructed to return a verdict of voluntary manslaughter if "the defendant, at the time that he performed the act which caused the death of [the victim], believed the circumstances to be such that they justified the deadly force he used, but his belief that such circumstances existed was unreasonable." (*Id.* at 185.)

Had the jury been instructed on involuntary manslaughter it would have been instructed as follows:

> To sustain the charge of involuntary manslaughter, the State must prove the following propositions:
>
> *First*: That the defendant performed the acts which caused the death of [the victim]; and
> *Second*: That the defendant performed those acts recklessly; and

> *Third*: That those acts were likely to cause death or great bodily harm.
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonably doubt, then you should find the defendant guilty.

Ill. Pattern Jury Instr.-Criminal 7.08 (1968 ed.); *see also* 111. Pattern Jury Instr.-Criminal 7.08 (2006 ed.). Unquestionably, the jury would have found the State sufficiently proved the first and third propositions: the first was not disputed and the third is a lower threshold than the "strong probability of death or great bodily harm" baseline showing required under the murder/voluntary manslaughter instruction. The second proposition houses the recklessness requirement, which the trial and appellate courts narrowed as the justification issue (*i.e.* because Mr. Calloway was justified in shooting Ms. Murray, he could not have also been reckless).

In light of the record and the jury's verdict, the Illinois appellate court's decision appears fundamentally misplaced. The appellate court stated: "Since defendant was justified in struggling with Murray in order to protect himself after Murray drew a weapon, defendant's actions were not reckless." *People v. Calloway*, slip op. at 8 (citing *Castillo*, 188 Ill. 2d at 541.) In fact, the jury found beyond a reasonable doubt that Mr. Calloway was not justified in his actions. Therefore, the Illinois court's conclusion appears inconsistent with the

record and verdict. Furthermore, under Illinois law, even if the trial court would have found conflicting evidence concerning recklessness, Mr. Calloway still had a right to an instruction defining the lesser included offense. *See People v. Jenkins*, 30 Ill.App.3d 1034, 333 N.E.2d 497 (Ill. App. Ct. 1977); 21 Ill. Law and Prac. Homicide § 156; *see also Nichols*, 710 F.2d at 1269 (examining federal law).

The facts presented by Mr. Calloway's situation are unique in many respects. Unlike in *Castillo*, the case relied on by the Illinois appellate court, the only pieces of direct evidence in the case were Mr. Calloway's own statements to law enforcement – there were no eyewitnesses. 188 Ill.2d at 538-39, 723 N.E.2d at 275-76; *see also Robertson*, 140 F.3d at 709 (no fundamental miscarriage of justice when police informant testified "that on the three occasions charged she observed [petitioner] deliver to the police officer what appeared to her to be cocaine and witnessed the officer pay [petitioner] for the contraband"); *Reeves*, 2000 WL 1466201, at *4 ("There was eyewitness testimony that petitioner repeatedly kicked [the victim] while [the victim] lay face down in the street.") *aff'd*, 272 F.3d 918, 921 (7th Cir. 2001) (there was no fundamental miscarriage of justice "'[g]iven such substantial evidence of intentional misconduct"). The fatal injury here was not one that was inconsistent with Mr. Calloway's statement. *See Wilson*, 994 F.2d at 1239 (where victim was a four year-old child that was kicked and punched until his stomach ruptured, petitioner "failed to direct [the court] to any evidence in record

that can reasonably explain [the victim's] death in any way other way"). Mr. Calloway's statements are corroborated throughout parts of the record.

Although I find a credible evidentiary basis exists for an involuntary manslaughter instruction, petitioner must still show that it would be improbable for a reasonable jury to convict him of voluntary manslaughter. *See Everette*, 37 F.3d at 262; *Nichols*, 710 F.2d at 1269. The Seventh Circuit has not elaborated on how a petitioner would go about proving such a proposition, but has suggested this to be a challenge to the sufficiency of the evidence. *See Robertson*, 140 F.3d at 711; *Nichols*, 710 F.2d at 1271; *Peery*, 615 F.2d at 404 (citing *Cupp v. Naughten*, 414 U.S. 141, 147 (1973) ("Due Process clause requires State in criminal prosecutions to prove guilt beyond a reasonable doubt)). In a case such as this one, this presents an impossible burden on the petitioner, for the practical distinction between voluntary and involuntary manslaughter on this record ultimately rests with the jury's credibility determination of Mr. Calloway's statements. On one hand, the jury did find him credible enough to reject the murder charge and find the existence of a mitigating factor by a preponderance of the evidence. On the other, the jury rejected his self-defense claim. Overall, petitioner has not shown the record in this case precludes a finding of voluntary manslaughter.

Therefore, although I find the record sufficiently entitled Mr. Calloway to the lesser included instruction, I cannot conclude it improbable for a

reasonable jury to convict Mr. Calloway of voluntary manslaughter. Accordingly, Mr. Calloway has not shown the existence of a fundamental miscarriage of justice and is not entitled to relief under § 2254.

III.

For the reasons set forth above, the petition for writ of habeas corpus is denied.

ENTER ORDER:

Elaine E. Bucklo
United States District Judge

Dated: December 15, 2006

Appendix C

In The Appellate Court of Illinois
First Judicial District

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
DONALD CALLOWAY, Defendant-Appellant.

Appeal from the Circuit Court of Cook County.

No. 01 CR 031608

Honorable Paul J. Nealis, Judge Presiding

No. 01-04-2418

FIFTH DIVISION

September 9, 2005

ORDER

Following a jury trial, defendant Donald Calloway, a/k/a Robert Ducks, was convicted of voluntary manslaughter[1] and sentenced to an extended term of 12-years' imprisonment, based on a previous

[1] In 1987, the Criminal Code was amended to replace the crime of voluntary manslaughter with second-degree murder. Since the offense in this case took place prior to 1987, the previous terminology is used.

conviction. On appeal, defendant contends he was entitled to an involuntary manslaughter jury instruction. Defendant also contends the trial court improperly extended his sentence. We affirm.

On March 20, 1979, defendant and his ex-wife, Margie Murray, were observed leaving a bar together. The next day, a woman's body was discovered behind an abandoned house in Harvey, Illinois. Using a bank deposit slip found on the body, the police were able to identify the woman as Murray.

Murray was known to carry a handgun in her purse. A .32 caliber handgun was recovered from Murray's home. Testing done by the Illinois State Police laboratory determined that a bullet fragment from Murray's skull came from the .32 caliber handgun. Murray's van was later found in Houston, Texas. On April 19, 1979, an arrest warrant was issued for defendant under the name Donald Calloway.

Twenty-two years later, in 2001, defendant was indicted on a federal charge of mail fraud in Chicago, Illinois. At that time, defendant was using the name Robert Ducks. A comparison of defendant's fingerprints matched the fingerprints of an individual know as Donald Calloway. Defendant's federal parole officer noticed there was an active arrest warrant for Donald Calloway, and he contacted the Harvey Police Department. In 2002, defendant pled guilty to the federal charge of mail

fraud and was sentenced to 16-months' imprisonment.

On December 6, 2001, defendant was arrested for the murder of Murray and taken to the Harvey Police Department. At first, defendant denied that his real name was Donald Calloway and claimed not to know that any of his ex-wives were dead. Later, defendant told the Harvey Police that his name used to be Donald Calloway, but that he decided to change his name to Robert Ducks. Defendant then stated that he remembered that one of his ex-wives was deceased.

On December 7, 2001, defendant was interviewed by Detective William Martin. Defendant's wife was also present at the interview. During the interview, defendant wrote out a statement on a pad of paper. Defendant's wife asked to see the statement, Detective Martin gave it to her, and she tore up the statement. At trial, Detective Martin, who had read the statement before it was destroyed, testified as to its contents. According to Detective Martin, the statement read that defendant had met Murray at a bar, they left together in her van, a verbal confrontation began, the confrontation became physical, Murray pulled a gun out of her purse, and when defendant attempted to take the gun from her, the gun went off shooting her in the head.

On December 8, 2001, defendant gave a videotaped statement at the Harvey Police Department. Defendant stated that on March 20, 1979, he met

Murray at a bar. The two left the bar together in Murray's van, drove a few blocks, and parked. Defendant and Murray began to have a conversation; they started to argue, and the argument became physical when Murray pushed defendant and defendant pushed her back. Murray pulled a gun out of her purse and pointed it at defendant. Defendant grabbed the gun and tried to wrestle it away from Murray. As they continued to struggle, the gun fired when it was pointed at Murray. Defendant then drove the van to a vacant area and dumped Murray's body. Defendant got back into the van and drove to Texas. After a day or two, defendant came back to Chicago, leaving Murray's van in Texas. Defendant eventually changed his name to Robert Ducks.

At trial, Dr. Shaku Teas testified that she performed the autopsy of Murray on March 22, 1979, and prepared an autopsy report. Dr. Teas did not observe any stippling, specks of gun powder embedded into the skin, around Murray's gunshot wound. Because there was no stippling, Dr. Teas believed the gun was at least one foot away from Murray's head when it was fired. In her opinion, Dr. Teas also believed that the angle of Murray's gunshot wound was not consistent with two people facing each other, struggling over a gun. Instead, Dr. Teas believed that Murray was facing forward and her assailant was to the right of her when she was shot.

Dr. Larry Blum testified for defendant as an expert in forensic pathology. Dr. Blum believed that

because Murray wore a wig, the wig and her hair could have prevented stippling. In Dr. Blum's opinion, Dr. Teas' 1979 autopsy report was not inconsistent with defendant's statement that the gun went off during a struggle.

Murray's daughter, Jessica Christmas, testified that Murray wore a wig made of human hair with a fishnet backing. Dr. Teas, testifying as a rebuttal witness, opined that a human hair wig with a fishnet backing would not prevent stippling.

Defendant tendered jury instructions for involuntary manslaughter. The trial court refused to give the jury an instruction for involuntary manslaughter, stating that the evidence did not justify such an instruction.

The jury found defendant guilty of voluntary manslaughter.

At sentencing, the State sought to extend defendant's sentence because of defendant's prior federal conviction for mail fraud in 2002. The trial court determined that defendant's federal mail fraud conviction was akin to the Class 1 offense of theft by deception in Illinois and found defendant eligible for an extended sentence. Defendant was sentenced to 12 years in prison.

A certified copy of defendant's federal mail fraud plea agreement was submitted to the trial court. In the plea agreement, defendant stated that he was a real estate broker at Easy Life. Easy Life purchased

and rehabilitated properties, and defendant solicited buyers for these properties. Many of the solicited buyers did not legitimately qualify for a mortgage. Defendant would provide such a buyer with money, and instruct the buyer to place the money in a relative's account and then transfer the money from the relative's account to the buyer's own account. Defendant would then instruct the buyer to falsely inform the United States Department of Housing and Urban Development (HUD) that the money was a gift given to the buyer from a relative. Defendant knew that HUD would rely on this misrepresentation when determining whether to grant or insure a mortgage. Because of these misrepresentations, HUD provided mortgages and mortgage insurance to buyers that would not have normally qualified. HUD suffered a financial loss because of default or foreclosure, and the federal government attributed $132,868 of this loss to defendant.

On appeal, defendant first contends the trial court abused its discretion by refusing to give an involuntary manslaughter instruction to the jury. A trial court's decision to refuse to give a jury instruction is reviewed under the abuse of discretion standard. *People v. Davis*, 213 Ill. 2d 459, 475 (2004). An instruction for involuntary manslaughter should be given when there is some evidence that would reduce the crime to involuntary manslaughter. *People v. DiVincenzo*, 183 Ill. 2d 239, 249 (1998). Where some evidence supports the instruction on the offense of involuntary manslaughter, the trial court's

failure to give the instruction constitutes an abuse of discretion. *DiVincenzo*, 183 Ill. 2d at 249.

Involuntary manslaughter is committed when a person, without lawful justification, unintentionally kills an individual by performing acts that are likely to cause death or great bodily harm, and these acts are performed recklessly. *People v. Castillo*, 188 Ill. 2d 536, 540 (1999); Ill Rev. Stat. 1979, ch. 38, par. 9-3(a). A person acts recklessly when "he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, *** and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." I11. Rev. Stat. 1979, ch. 38, par. 4-6.

In his brief, defendant lists a number of examples of how the jury could have concluded, based on the evidence introduced at trial, that he was reckless. Defendant's examples may be separated into one of two scenarios: (1) Murray pulled the gun out of her purse and the gun discharged while defendant and Murray were struggling over the weapon, and (2) defendant produced the gun and shot Murray during a struggle. Recklessness is determined by the totality of the circumstances. *People v. Wilson*, 143 Ill. 2d 236, 246 (1991); *People v. Barham*, 337 Ill. App. 3d 1121, 1127 (2003). Therefore, we must determine whether a jury instruction on involuntary manslaughter was warranted based on each scenario, and not the alleged individual reckless acts.

Defendant asserts that his statements made to the police provide some evidence to support a finding of involuntary manslaughter by the jury. Specifically, defendant argues that the portions of his statements, where he told the police that the gun went off while he and Murray were struggling, show some evidence of recklessness. In our view, even when taken as true, defendant's statements do not contain any evidence of recklessness.

We find *Castillo* instructive. In *Castillo*, the victim drew a gun and pointed it at the defendant. The defendant was able to wrestle the gun away from the victim, but when the victim grabbed the defendant, the gun discharged striking the victim. The defendant argued that he was entitled to a jury instruction on involuntary manslaughter based on the evidence that he struggled with the victim after the victim produced a gun. The Illinois Supreme Court disagreed, holding that the defendant did not act recklessly when struggling with the victim after the victim drew a gun because the defendant was acting with regard to a justifiable risk of injuring the victim in order to protect himself. *Castillo*, 188 Ill. 2d at 541.

Here, like in *Castillo*, defendant stated that the victim, Murray, produced the gun. Since defendant was justified in struggling with Murray in order to protect himself after Murray drew a weapon, defendant's actions were not reckless. *See Castillo*, 188 Ill. 2d at 541. Therefore, the evidence in

defendant's statements did not entitle him to a jury instruction on involuntary manslaughter.

In the alternative, defendant asserts that he was reckless for producing the gun. Defendant bases this contention on the State's closing argument, in which the State argued that defendant, and not Murray, pulled the gun out of Murray's purse. However, statements made during closing arguments are not evidence. *People .v. West*, 187 Ill. 2d 418, 443 (1999). The record does not contain any evidence that defendant produced the gun. Because there is no evidence that defendant drew the gun during the struggle with Murray, the trial court was not required to give an instruction on involuntary manslaughter. *See Castillo*, 188 Ill. 2d at 541.

Defendant's second contention is that the trial court improperly extended his sentence. If a trial court imposes an extended-term sentence where the requirements of the extended-term sentencing statute have not been met, the extended-term portion of the sentence is void. *People v. Harvey*, 196 111. 2d 444, 448 (2001). Whether a sentence is extendable is a matter of law and is reviewed *de novo*. *See People v. Milka*, 336 Ill. App. 3d 206, 235 (2003).

Defendant elected to be sentenced under the law in effect at the time of the offense. *See People v. Hollins*, 51 Ill. 2d 68, 71 (1972) (holding that a defendant has the option of being sentenced under either the law in effect at the time the offense was

committed or in effect at the time of sentencing). Accordingly, the trial court applied the 1979 sentencing laws.

In 1979, voluntary manslaughter was a Class 2 felony with a sentencing range of three to seven years. Ill. Rev. Stat. 1979, ch. 38, par. 9-2(c) and par. 1005-8-1(a)(5). To extend defendant's sentence beyond this range, the trial court was required to find that one of the factors in section 5-5-3.2 of the Uniform Code of Corrections was present. *See* Ill. Rev. Stat. 1979, ch. 38, par. 1005-8-2. Here, the trial court relied on defendant's prior federal conviction for mail fraud to extend his sentence. A trial court may extend a defendant's sentence "[w]hen a defendant is convicted of any felony, after having been previously convicted in Illinois of the same or greater Class felony, within 10 years, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of act." Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3.2 (b)(1).

Defendant's sole challenge to his extended sentence is that his prior federal conviction was not for a "same or greater class felony" as his current conviction for voluntary manslaughter. Defendant was previously convicted of federal mail fraud in Chicago, Illinois. Federal convictions that occurred in Illinois may be used to extend a sentence under section 5-5-3.2(b)(1) of the Uniform Code of Corrections (Code). *People v. Harden*, 113 Ill. 2d 14, 22 (1986); *People v. Lewis*, 211 Ill. App. 3d 276, 281

(1991). Federal offenses are not classified in the same manner as they are in Illinois. In order to determine whether a prior federal conviction was for a "same or greater class felony," the trial court may compare the federal statute, under which the defendant was convicted, to an analogous statute in Illinois. *See People v. Cavins*, 288 Ill. App. 3d 173, 184 (1997) (upholding trial court's comparison of Iowa and Illinois statute when deciding whether prior Iowa conviction could be used to extend sentence).

Under the laws in effect when defendant committed voluntary manslaughter, that offense was a Class 2 felony. Ill. Rev. Stat. 1979, ch. 38, par. 9-2(c). Therefore, in order to serve as the basis for an extended-term sentence, defendant's federal mail fraud conviction had to be the equivalent of at least a Class 2 felony in Illinois. The trial court compared defendant's federal mail fraud conviction to Class 1 theft by deception in Illinois, and determined that defendant was eligible for an extended sentence. Defendant argues that the trial court's ruling was contrary to the law. We disagree.

First, defendant asserts that the trial court was required to look at the maximum allowable sentence defendant faced for his federal mail fraud conviction when determining whether the defendant's prior conviction was the same or greater class felony. Contrary to defendant's assertion, the trial court may compare the foreign statute, under which the defendant was convicted, to an analogous statute in

Illinois. *See Cavins*, 288 Ill. App. 3d at 184. Therefore, the trial court did not err by comparing the federal crime of mail fraud with a similar crime in Illinois instead of relying on the maximum sentence defendant faced for his federal mail fraud conviction.

Defendant also asserts the State inaccurately informed the trial court that defendant faced a maximum 20-year sentence for his federal mail fraud conviction. However, the trial court did not find that defendant's prior federal conviction was the same or greater class felony as his current conviction for voluntary manslaughter on the grounds of the maximum penalty defendant faced in his federal mail fraud conviction. Instead, the trial court based its finding solely on a comparison between defendant's mail fraud conviction and the crime of theft by deception in Illinois. Therefore, defendant's argument is without merit. *See People v. Kliner*, 185 Ill. 2d 81, 174-75 (1998) (holding that improper remarks not relied upon by the trial court during sentencing did not entitle defendant to a new sentencing hearing).

Next, defendant asserts that the trial court's analysis was contrary to the language of section 5-5-3.2 of the Code. Before the trial court may extend a sentence based on a prior conviction, section 5-5-3.2 of the Code requires the trial court to find that defendant was previously "convicted in Illinois of the same or greater class felony." Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3.2(b)(1). Defendant argues that

because he was convicted of federal mail fraud and not theft by deception, the trial court's comparison of defendant's federal conviction to the crime of theft by deception in Illinois was contrary to the express language of section 5-5-3.2 of the Code. However, a federal conviction that occurred Illinois [sic] may be used to extend a sentence. *Harden*, 113 Ill. 2d at 22; Lewis, 211 Ill. App. 3d at 281. Since the federal criminal system does not classify its felonies, the trial court was required to look beyond the mere title of defendant's federal conviction in order to determine whether the prior conviction was for "the same or greater class felony." Since the statute explicitly requires the trial court to make this determination, (*People v. Olivo*, 183 Ill. 2d 339, 340 (1998); 111. Rev. Stat. 1979, ch. 38, par. 1005-5-3.2(b)(1), the trial court's analysis was not contrary to the language of section 5-5-3.2 of the Code.

Defendant also asserts that even if it was proper for the trial court to compare his federal mail fraud conviction to the crime of theft by deception in Illinois, the trial court was required to apply the Criminal Code as it existed in 1979. Under the laws in effect in 1979, theft by deception was a Class 3 felony. 111. Rev. Stat. 1979, ch. 38, par. 16-1(e)(3). In support of this argument, defendant cites *People v. Harvey*, 196 Ill. 2d 444 (2001), for the proposition that the trial court must look at the relative classifications of both convictions at a single point in time. However, defendant misconstrues the Illinois Supreme Court's holding in *Harvey*. In *Harvey*, the trial court extended the defendant's

sentence for armed robbery because the defendant had been previously convicted of attempted murder. At the time the defendant committed attempted murder, the crimes of attempted murder and armed robbery were both classified as Class 1 felonies. When the defendant later committed armed robbery, attempted murder and armed robbery had both been reclassified as Class X felonies. In rejecting the defendant's argument that the classification for his prior attempted murder conviction should be determined in accordance with the laws that existed at the time he committed that crime, the supreme court held that the actual classification of the two offenses was not important for the purposes of the extended-term sentencing provisions and that "the critical inquiry in determining whether those sentencing provisions are applicable is the relative severity of the offenses." *Harvey*, 196 Ill. 2d at 449-51. Contrary to defendant's argument, the supreme court did not instruct the trial court to examine the relative classifications of both convictions at a single point in time, but, instead, held that the trial court must look at the relative severity of the offenses and not the technical classifications of the two crimes. Given this broad instruction from the Illinois Supreme Court, we hold that the trial court did not err when it compared the severity of defendant's 2002 federal mail fraud conviction to a similar Illinois crime in effect that same year.

Next, defendant asserts that the trial court violated his sixth amendment right to a jury trial by determining whether defendant's federal mail fraud

conviction was equivalent to the crime of theft by deception in Illinois. Defendant argues that under *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), the jury and not the trial court should have made this determination. In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 147 L. Ed. 2d at 455, 120 S. Ct. At 2362-63. The exception in *Apprendi* for "the fact of a prior conviction" includes not only the mere fact of the existence of a previous conviction, but also determinations as to whether the conviction qualifies the defendant for a sentencing extension. *See Shepard v. United States*, __ U.S. __, 161 L. Ed. 2d 205, 211, 125 S. Ct. 1254, 1257 (2005) (holding that trial court may look to the statutory elements, charging documents, and written plea agreement in determining whether a prior conviction for burglary is a violent felony). *See also People v. Smith*, 338 Ill. App. 3d 555, 561 (2003) (rejecting argument that *Apprendi* required jury to make certain determinations regarding defendant's prior convictions including the timing, degree, number, and sequence). Therefore, the trial court's determination that defendant's federal mail fraud conviction was of a same or greater class as defendant's voluntary manslaughter conviction was not in violation of *Apprendi*.

Defendant also asserts that the facts contained in his federal plea agreement fail to establish all the elements of the crime of theft by deception in Illinois. Specifically, defendant argues that the facts contained in the plea agreement do not show that defendant obtained control over any property. The offense of theft by deception does not require the defendant to obtain control over any of the stolen property so long as someone the defendant was acting in concert with did. *See People v. Johnson*, 411 Ill. 276, 278 (1952) (holding that a defendant could be held guilty of the former offense of obtaining money by means of a confidence game, even if he did not receive any of the money, if he acted in concert with someone who did). Defendant's mail fraud plea agreement states that defendant made misrepresentations to HUD, and, in reliance of those misrepresentations, HUD provided mortgages and mortgage insurance to buyers that would not have normally qualified for such mortgages and mortgage insurance. Although these facts establish that the buyers, and not defendant, directly obtained the mortgages and mortgage insurance from HUD, defendant was an active participant in a scheme to defraud HUD. Therefore, defendant's failure to obtain control of any property would not have precluded a conviction for theft by deception. Accordingly, defendant's assertion is without merit.

Finally, defendant asserts that the trial court was required to compare defendant's federal mail fraud conviction to the offense of mail fraud in Illinois because the elements of the Illinois mail fraud

statute closely parallel the elements of the federal mail fraud statute. However, defendant has failed to cite, and we have been unable to locate, any authority for this proposition. Instead, based on our previous analysis, we conclude that the trial court properly compared the Illinois offense of theft by deception to defendant's federal conviction for mail fraud. Accordingly, the trial court did not err by comparing defendant's federal mail fraud conviction to the crime of theft by deception instead of Illinois mail fraud.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

O'BRIEN, J., with GALLAGHER, P.J., and NEVILLE, J., concurring.

Appendix D

Title 18 U.S.C.A. CHAPTER 63 - MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction hereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Appendix E

720 ILCS 5/17-24

§ 17-24. Fraudulent schemes and artifices

(a) Fraud by wire, radio, or television.

(1) A person commits wire fraud when he or she:

(A) devises or intends to devise a scheme or artifice to defraud or to obtain money or property by means of false pretenses, representations, or promises; and

(B)(i) transmits or causes to be transmitted from within this State; or

(ii) transmits or causes to be transmitted so that it is received by a person within this State; or

(iii) transmits or causes to be transmitted so that it is reasonably foreseeable that it will be accessed by a person within this State:

any writings, signals, pictures, sounds, or electronic or electrical impulses by means of wire, radio, or television communications for the purpose of executing the scheme or artifice.

(2) A scheme or artifice to defraud using electronic transmissions is deemed to occur in the county from which a transmission is sent, if the transmission is sent from within this State, the

county in which a person within this State receives the transmission, and the county in which a person who is within this State is located when the person accesses a transmission.

(3) Wire fraud is a Class 3 felony.

(b) Mail fraud.

(1) A person commits mail fraud when he or she:

(A) devises or intends to devise any scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit obligation, security, or other article, or anything represented to be or intimidated or held out to be such counterfeit or spurious article; and

(B) for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter within this State, any matter or thing whatever to be delivered to the Postal Service, or deposits or causes to be deposited in this State by mail or by private or commercial carrier according to the direction on the matter or thing, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing.

(2) A scheme or artifice to defraud using a government or private carrier is deemed to occur in the county in which mail or other matter is deposited with the Postal Service or a private commercial carrier for delivery, if deposited with the Postal Service or a private or commercial carrier within this State and the county in which a person within this State receives the mail or other matter from the Postal Service or a private or commercial carrier.

(3) Mail fraud is a Class 3 felony.

(c) Financial institution fraud.

(1) A person is guilty of financial institution fraud who knowingly executes or attempts to execute a scheme or artifice:

(i) to defraud a financial institution; or

(ii) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of a financial institution, by means of pretenses, representations, or promises he or she knows to be false.

(2) Financial institution fraud is a Class 3 felony.

Appendix F

720 ILCS 5/16-1

§ 16-1. Theft.

(a) A person commits theft when he knowingly:

(1) Obtains or exerts unauthorized control over property of the owner; or

(2) Obtains by deception control over property of the owner; or

(3) Obtains by threat control over property of the owner; or

(4) Obtains control over stolen property knowing the property to have been stolen or under such circumstances as would reasonably induce him to believe that the property was stolen; or

(5) Obtains or exerts control over property in the custody of any law enforcement agency which is explicitly represented to him by any law enforcement officer or any individual acting in behalf of a law enforcement agency as being stolen, and

(A) Intends to deprive the owner permanently of the use or benefit of the property; or

(B) Knowingly uses, conceals or abandons the property in such manner as to deprive the owner permanently of such use or benefit; or

(C) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

(b) Sentence.

(1) Theft of property not from the person and not exceeding $300 in value is a Class A misdemeanor.

(1.1) Theft of property not from the person and not exceeding $300 in value is a Class 4 felony if the theft was committed in a school or place of worship or if the theft was of governmental property.

(2) A person who has been convicted of theft of property not from the person and not exceeding $300 in value who has been previously convicted of any type of theft, robbery, armed robbery, burglary, residential burglary, possession of burglary tools, home invasion, forgery, a violation of Section 4 103, 4 103.1, 4 103.2, or 4 103.3 of the Illinois Vehicle Code relating to the possession of a stolen or converted motor vehicle, or a violation of Section 8 of the Illinois Credit Card and Debit Card Act is guilty of a Class 4 felony. When a person has any such prior conviction, the information or indictment charging that person shall state such prior conviction so as to give notice of the State's intention to treat the charge as a felony. The fact of such prior conviction is not an element of the offense

and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial.

(3) (Blank).

(4) Theft of property from the person not exceeding $300 in value, or theft of property exceeding $300 and not exceeding $10,000 in value, is a Class 3 felony.

(4.1) Theft of property from the person not exceeding $300 in value, or theft of property exceeding $300 and not exceeding $10,000 in value, is a Class 2 felony if the theft was committed in a school or place of worship or if the theft was of governmental property.

(5) Theft of property exceeding $10,000 and not exceeding $100,000 in value is a Class 2 felony.

(5.1) Theft of property exceeding $10,000 and not exceeding $100,000 in value is a Class 1 felony if the theft was committed in a school or place of worship or if the theft was of governmental property.

(6) Theft of property exceeding $100,000 and not exceeding $500,000 in value is a Class 1 felony.

(6.1) Theft of property exceeding $100,000 in value is a Class X felony if the theft was committed in a school or place of worship or if the theft was of governmental property.

(6.2) Theft of property exceeding $500,000 in value is a Class 1 non-probationable felony.

(7) Theft by deception, as described by paragraph (2) of subsection (a) of this Section, in which the offender obtained money or property valued at $5,000 or more from a victim 60 years of age or older is a Class 2 felony.

(c) When a charge of theft of property exceeding a specified value is brought, the value of the property involved is an element of the offense to be resolved by the trier of fact as either exceeding or not exceeding the specified value.

Appendix G

Chapter 38 – Criminal Law and Procedure

§ 9-2. Voluntary Manslaughter. (a) A person who kills an individual without lawful justification commits voluntary manslaughter if at the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by:

(1) The individual killed, or

(2) Another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed.

Serious provocation is conduct sufficient to excite an intense passion in a reasonable person.

(b) A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable.

(c) Sentence.

Voluntary manslaughter is a Class 2 felony.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

Appendix H

Chapter 38 – Criminal Law and Procedure

9-3. Involuntary manslaughter and reckless homicide

§ 9-3. Involuntary Manslaughter and Reckless Homicide. (a) A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly, except in cases in which the cause of the death consists of the driving of a motor vehicle, in which case the person commits reckless homicide.

(b) Sentence.

(1) Involuntary manslaughter is a Class 3 felony.

Amended by P.A. 79-679, § 1, eff. Oct. 1, 1975.

Appendix I

Chapter 38 – Criminal Law and Procedure

1005-8-1. Sentence of imprisonment for felony

§ 5-8-1. Sentence of Imprisonment for Felony.

(a) A sentence of imprisonment for a felony shall be a determinate sentence set by the court under this Section, according to the following limitations:

(1) for murder, a term shall be not less than 20 years and not more than 40 years, or, if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present, the court may sentence the defendant to a term of natural life imprisonment;

(2) for a person adjudged a habitual criminal under Article 33B of the Criminal Code of 1961, as amended, the sentence shall be a term of natural life imprisonment;

(3) for a Class X felony, the sentence shall be not less than 6 years and not more than 30 years;

(4) for a Class 1 felony, the sentence shall be not less than 4 years and not more than 15 years;

(5) for a Class 2 felony, the sentence shall be not less than 3 years and not more than 7 years;

(6) for a Class 3 felony, the sentence shall be not less than 2 years and not more than 5 years;

(7) for a Class 4 felony, the sentence shall be not less than 1 year and not more than 3 years;

(b) The sentencing judge in each felony conviction shall set forth his reasons for imposing the particular sentence he enters in the case, as provided in Section 5 4 1 of this Code. Those reasons may include any mitigating or aggravating factors specified in this Code, or the lack of any such circumstances, as well as any other such factors as the judge shall set forth on the record that are consistent with the purposes and principles of sentencing set out in this Code.

(c) The trial court may reduce or modify a sentence, but shall not increase the length thereof by order entered not later than 30 days from the date that sentence was imposed. This shall not enlarge the jurisdiction of the court for any other purpose.

(d) Except where a term of natural life is imposed, every sentence shall include as though written therein a term in addition to the term of imprisonment. For those sentenced under the law in effect prior to this amendatory Act of 1977, such term shall be identified as a parole term. For those sentenced on or after such effective date, such term shall be identified as a mandatory supervised release term. Subject to earlier termination under Section 3 3 8, the parole or mandatory supervised release term shall be as follows:

(1) for murder or a Class X felony, 3 years;

(2) for a Class 1 felony or a Class 2 felony, 2 years;

(3) for a Class 3 felony or a Class 4 felony, 1 year.

(e) A defendant who has a previous and unexpired sentence of imprisonment imposed by another state and who, after sentence for a crime in Illinois, must return to serve the unexpired prior sentence may have his sentence by the Illinois court ordered to be concurrent with the prior sentence in the other state. The court may order that any time served on the unexpired portion of the sentence in the other state, prior to his return to Illinois, shall be credited on his Illinois sentence. The other state shall be furnished with a copy of the order imposing sentence which shall provide that, when the offender is released from confinement of the other state, whether by parole or by termination of sentence, the offender shall be transferred by the Sheriff of the committing county to the Illinois Department of Corrections. The court shall cause the Department of Corrections to be notified of such sentence at the time of commitment and to be provided with copies of all records regarding the sentence.

Appendix J

Chapter 38 – Criminal Law and Procedure

§ 5-8-2. Extended term.

(a) A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 were found to be present. Where the judge finds that such factors were present, he may sentence an offender to the following:

(1) for murder, a term shall be not less than 40 years and not more than 80 years;

(2) for a Class X felony, a term shall be not less than 30 years and not more than 60 years;

(3) for a Class 1 felony, a term shall be not less than 15 years and not more than 30 years;

(4) for a Class 2 felony, a term shall be not less than 7 years and not more than 14 years;

(5) for a Class 3 felony, a term shall be not less than 5 years and not more than 10 years;

(6) for a Class 4 felony, a term shall be not less than 3 years and not more than 6 years.

(b) If the conviction was by plea, it shall appear on the record that the plea was entered with the defendant's knowledge that a sentence under this

Section was a possibility. If it does not so appear on the record, the defendant shall not be subject to such a sentence unless he is first given an opportunity to withdraw his plea without prejudice.

Appendix K

United States District Court
for the Northern District of Illinois
Eastern Division

United States of America,
v.
Robert Ducks.

No. 01 CR 498-4

PLEA AGREEMENT

This Plea Agreement between the United States Attorney for the Northern District of Illinois, PATRICK J. FITZGERALD, and the defendant, ROBERT DUCKS, and his attorney, GERALD COLLINS, is made pursuant to Rule 11 of the Federal Rules of Criminal Procedure and is governed in part by Rule 11(e)(1)(C), as more fully set forth in Paragraph 16, below.

This Plea Agreement is entirely voluntary and represents the entire agreement between the United States Attorney and defendant regarding defendant's criminal liability in case 01 CR 408-4.

This Plea Agreement concerns criminal liability only, and nothing herein shall limit or in any way waive or release any administrative or judicial civil claim, demand or cause of action, whatsoever, of the United States or its agencies. Moreover, this Agreement is

limited to the United States Attorney's Office for the Northern District of Illinois and cannot bind any other federal, state or local prosecuting, administrative or regulatory authorities except as expressly set forth in this Agreement.

By this Plea Agreement, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, and the defendant, ROBERT DUCKS, and his attorney, GERALD COLLINS, have agreed upon the following:

1. Defendant acknowledges that he has been charged in the indictment in this case with one count of mail fraud in violation of Title 18, United States Code, Section 1341, and one count of making a false statement on a loan application in violation of Title 18, United States Code, Section 1010.

2. Defendant has read the charges against him contained in the indictment, and those charges have been fully explained to him by his attorney.

3. Defendant fully understands the nature and elements of the crimes with which he has been charged.

4. Defendant will enter a voluntary plea of guilty to Count Six of the indictment in this case.

5. Defendant will plead guilty because he is in fact guilty of the charges contained in Counts Six of the indictment. In pleading guilty, defendant

admits the following facts and that those facts establish his guilt beyond a reasonable doubt:

Beginning at least as early as January 1990 and continuing to at least in or about July 1998, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, defendant ROBERT DUCKS, and other persons both known and unknown to the Grand Jury, devised, intended to devise, and participated in a scheme and artifice to defraud and to obtain money and property from HUD and the Lenders, by means of materially false and fraudulent pretenses, representations, and promises well-knowing at the time that the pretenses, representations, and promises were false when made.

More specifically, defendant ROBERT DUCKS worked as a real estate broker at Easy Life for several years in the 1990s. During defendant DUCKS' employment at Easy Life, defendant Richard Nelson and Easy Life purchased dilapidated properties (the "Properties") primarily on the west-side of Chicago. After purchasing these Properties, defendant Richard Nelson and Easy Life rehabilitated the Properties using unlicensed and unskilled contractors.

After rehabilitation of a property was begun or was completed, defendant DUCKS solicited buyers for the property. In order to find buyers, defendant DUCKS and his co-defendants advertised low or no money-down mortgages. These advertisements by the

defendants attracted many financially unqualified and first-time home buyers who could not legitimately qualify for mortgages because their income and assets were too low to qualify for a mortgage.

Although many of the buyers did not legitimately qualify for a mortgage, defendant DUCKS provided the buyers with cash or money orders in order to assist the buyers in misrepresenting their qualifications for a mortgage. The money was given to defendant DUCKS by defendant NELSON or defendant MORALES on behalf of defendant NELSON. After defendant DUCKS gave the money to the buyers or their friend/relative, defendant DUCKS instructed the buyers to deposit the money into the bank account of a relative or their own bank account. Defendant DUCKS then instructed the buyers to withdraw the money from the relative's account and place the money in their own account. Finally, defendant DUCKS instructed the buyers to return the money to Easy Life to be used as part of the down payment at the time of closing.

Defendant DUCKS, knowing that gifts received from relatives were acceptable to the Lenders and HUD in place of the buyers' own funds, instructed the buyers to complete a fraudulent Gift Letter or Gift Affidavit which falsely reflected that a gift had been given to the buyer by his/her relative or friend. This fraudulent Gift Letter or Gift Affidavit was signed by the buyer, their relative, and was notarized by an employee of Easy Life.

Defendant DUCKS and his co-defendants submitted fraudulent Gift Letters/Affidavits to the Lenders and the Gift Letters/Affidavits became a part of the closing packages for the buyers. The defendants knew that the Lenders and ultimately HUD relied on the misrepresentations in the Gift Letters/Affidavits in determining whether to issue and/or insure a mortgage for the buyer.

Because of the misrepresentations to the Lenders and HUD made and caused by defendant DUCKS regarding the source of the buyers' gifts, the Lenders and HUD provided mortgages and mortgage insurance to buyers who would otherwise be unqualified for such mortgages and mortgage insurance. After securing HUD/FHA insured mortgages, HUD/FHA mailed Mortgage Insurance Certificates (MICs) to the Lenders.

HUD has suffered a loss due to default or foreclosure on certain properties sold by defendant DUCKS. Accordingly, the amount of loss attributable to defendant DUCKS is $132,868.

On or about May 8, 1996, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere, ROBERT DUCKS, for the purpose of executing the aforesaid scheme to defraud, and attempting to do so, knowingly caused an envelope containing a U.S. Department of Housing and Urban Development Mortgage Insurance Certificate pertaining to the property located at 520 N. Lavergne Ave., Chicago, Illinois 60644, to be placed

in an authorized depository for mail matter to be sent by the United States Postal Service according to the directions thereon to Dependable Mortgage Chicago Bank Building, 1400 Torrence Ave. 2nd F1. South, Calumet City, IL 60409; in violation of Title 18, United States Code, Sections 1341 and 2.

The preceding is set forth solely for the purpose of establishing a basis for the defendant's plea of guilty. It does not include all of the information known by the defendant that pertains to the offense and related matters.

6. For purposes of applying the guidelines promulgated by the United States Sentencing Commission pursuant to Title 28, United States Code, Section 994, the parties agree on the following points:.

(a) The United States Sentencing Guidelines effective November 1, 1997, apply to this case.

(b) Pursuant to Guideline Section 2F1.1(a), the base offense level for this offense is level 6.

(c) Pursuant to Guideline Section 2F1.1(b)(1)(1) the base offense is increased 7 levels to 13 because the amount of loss was more than $120,000 but less than $200,000.

(d) Pursuant to Guideline Section 2F1.1(b)(2) the offense involved more than minimal

planning and therefore the base offense is increased two levels to level 15.

(e) Defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for his criminal conduct. If the government does not receive additional evidence in conflict with this provision, and if the defendant continues to, accept responsibility for his actions, within the meaning of Guideline 3E1.1, a two-level reduction in the offense level is appropriate.

(f) Based on information presently available to the government, the defendant's criminal history points equal zero and his criminal history category is I; and

(g) The defendant and his attorney and the government acknowledge that the above calculations are preliminary in nature and based on facts known to the government as of the time of this Agreement. The defendant understands that the Probation Department will conduct its own investigation and that the Court ultimately determines the facts and law relevant to sentencing, and that the Court's determinations govern the final Sentencing Guidelines calculation. Accordingly, the validity of this Agreement is not contingent upon the probation officer's or the Court's concurrence with the above calculations.

7. Errors in calculations or interpretation of any of the guidelines may be corrected by either party prior to sentencing. The parties may correct these errors or misinterpretations either by stipulation or by a statement to the probation office and/or court setting forth the disagreement as to the correct guidelines and their application. The validity of this Agreement will not be affected by such corrections, and the defendant shall not have a right to withdraw his plea on the basis of such corrections.

8. Defendant understands the count to which he will plead guilty carries a maximum penalty of five years imprisonment, a maximum fine of $250,000, and a term of supervised release.

9. The defendant understands that in accord with federal law, Title 18, United States Code, Section 3013, upon entry of judgment of conviction, the defendant will be assessed $100 on the count to which he has pled guilty, in addition to any other penalty imposed. The defendant agrees to pay the special assessment of $100 at the time of sentencing with a check or money order made payable to the Clerk of the U. S. District Court.

10. Defendant understands that by pleading guilty he surrenders certain rights, including the following:

(a) If defendant persisted in a plea of not guilty to the charges against him, he would have the right to a public and speedy trial. The trial could

be either a jury trial or a trial by the judge sitting without a jury The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, the defendant, the government, and the judge all must agree that the trial be conducted by the judge without a jury.

(b) If the trial is a jury trial, the jury would be composed of twelve laypersons selected at random. Defendant and his attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising so-called peremptory challenges. The jury would have to agree unanimously before it could return a verdict of either guilty or not guilty. The jury would be instructed that defendant is presumed innocent, and that it could not convict him unless, after hearing all the evidence, it was persuaded of defendant's guilt beyond a reasonable doubt and that it was to consider each count of the indictment separately.

(c) If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all the evidence, and considering each count separately, whether or not the judge was persuaded of defendant's guilt beyond a reasonable doubt.

(d) At a trial, whether by a jury or a judge, the government would be required to present its witnesses and other evidence against defendant.

Defendant would be able to confront those government witnesses and his attorney would be able to cross-examine them. In turn, defendant could present witnesses and other evidence in his own behalf. If the witnesses for defendant would not appear voluntarily, he could require their attendance through the subpoena power of the court.

(e) At a trial, defendant would have a privilege against self-incrimination so that he could decline to testify, and no inference of guilt could be drawn from his refusal to testify. If defendant desired to do so, he could testify in his own behalf.

11. Defendant understands that by pleading guilty he is waiving all the rights set forth in the prior paragraph. Defendant's attorney has explained those rights to him, and the consequences of his waiver of those rights. Defendant further understands he is waiving all appellate issues that might have been available if he had exercised his right to trial.

12. The defendant is also aware that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statutes of conviction (or the manner in which that sentence was determined), in exchange for the concessions made by the United States in this Plea Agreement. The defendant also waives his right to challenge his sentence or the

manner in which it was determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255. The waiver in this paragraph does not apply to a claim of involuntariness, or ineffective assistance of counsel, which relates directly to this waiver or to its negotiation.

13. Defendant agrees he will fully and truthfully cooperate with the government in any matter in which he is called upon to cooperate that is related to or results from the charges in this case.

(a) Defendant agrees to provide complete and truthful information in any investigation and pre-trial preparation, and complete and truthful testimony, if called upon to testify, before any federal grand jury and United States District Court proceeding, and any related civil administrative or court proceeding.

(b) Defendant agrees to postpone his sentencing until after the conclusion of the prosecution of his codefendants.

14. Defendant understands that the Agreement are matters of public record and may be disclosed to any party.

15. Defendant understands that the United States Attorney's Office will fully apprise the District Court and the United States Probation Office of the nature, scope and extent of defendant's conduct regarding the charges. against him, and related

matters, including all matters in aggravation and mitigation relevant to the issue of sentencing.

16. At the time of sentencing, the government shall make known to the sentencing judge the extent of defendant's cooperation, and, assuming the defendant's full and truthful cooperation, shall move the Court, pursuant to Sentencing Guideline 5K1.1 to depart from the applicable sentencing guidelines range, and to impose the specific sentence agreed to by the parties as outlined below. Defendant understands that the decision to depart from the applicable guidelines range rests solely with the Court. However, this Plea Agreement is governed, in part, by Federal Rule of Criminal Procedure 11(e)(1)(C). That is, the parties have agreed that the sentence imposed by the Court shall include a term of imprisonment in the custody of the Bureau of Prisons of two-thirds of the low-end of the applicable sentencing guidelines range. Other than the agreed term of incarceration, the parties have agreed that the Court remains free to impose the sentence it deems appropriate. If the Court accepts and imposes the agreed term of incarceration set forth, the defendant may not withdraw this plea as a matter of right guider Federal Rule of Criminal Procedure 11(e)(2) and (4). If, however, the Court refuses to impose the agreed term of incarceration set forth herein, thereby rejecting the Plea Agreement, or otherwise refuses to accept the defendant's plea of guilty, this Agreement shall become null and void and neither party will be bound thereto.

17. Regarding restitution, the parties acknowledge that the amount of restitution owed to the United States Department of Housing and Urban Development is $132,868, and that pursuant to Title 18, United States Code, Section 3663A the Court must order defendant to make restitution in this amount, minus any credit for funds repaid prior to sentencing. The defendant understands that Title 18, United States Code, Section 3664 and Sections 5E1.1 and 5E1.2 of the Sentencing Guidelines set forth the factors to be weighed in setting a fine and in determining the schedule, if any, according to which restitution is to be paid in this case. The defendant agrees to provide full and truthful information to the court and United States Probation Officer regarding all details of his economic circumstances in order to determine the proper restitution schedule according to which the defendant may be ordered to pay. Defendant understands that providing false or incomplete information may be prosecuted as a violation of Title, United States Code, Section 1001, or as a contempt of the court.

18. After sentence has been imposed on the count to which defendant pleads guilty as agreed herein, the government will move to dismiss the remaining count of the indictment as to this defendant.

19. Defendant understands that his compliance with each part of this Plea Agreement extends throughout and beyond the period of his

sentence, and failure to abide by any term of the Plea Agreement is a violation of the Agreement. He further understands that in the event he violates this Agreement, the government, at its option, may move to vacate the Plea Agreement, rendering it null and void, and thereafter prosecute the defendant not subject to any of the limits set forth in this Agreement, or to resentence the defendant. The defendant understands and agrees that in the event that this Plea Agreement is breached by the defendant, and the Government elects to void the Plea Agreement and prosecute the defendant, any prosecutions that are not time-barred by the applicable statute of limitations on the date of the signing of this Agreement may be commenced against the defendant in accordance with this paragraph, notwithstanding the expiration of the statute of limitations between the signing of this Agreement and the commencement of such prosecutions.

20. Defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in this Agreement, to cause defendant to plead guilty.

21. Defendant agrees this Plea Agreement shall be filed and become a part of the record in this case.

22. Defendant acknowledges that he has read this Agreement and carefully reviewed each

provision with his attorney. Defendant further acknowledges that he understands and voluntarily accepts each and every term and condition of this Agreement.

Appendix L

Excerpts from Videotaped Statement of Donald Calloway

Q. And before we spoke, I advised you of your constitutional rights, is that also correct?

A. That's correct.

Q. Donald Calloway, I talked to you earlier and you told me about the murder of Margie Mays. At that time you told me that you and Margie had been married and were divorced. You met Margie in a bar and then left that bar and went into Margie's van. Margie was driving the van and you were in the passenger seat. The two of you drove and Margie pulled over. Margie pulled out a gun after an argument began. You tried to get the gun and the gun was pointed at Margie and the gun went off. You then took Margie's body to a vacant area and dumped her body in the abandoned area and drove straight to Texas. You then came back to Chicago with a different name. You do not know what happened with the gun or Margie's purse. Donald, I'm going to read you your rights again. Do you understand that you have the right to remain silent?

A. Yes, I do.

Q. Do you understand that anything you say can be used against you in a court of law?

A. Yes, I do.

Q. Do you understand you have the right to talk to a lawyer and have him present with you while you are being questioned?

A. Yes, I do.

Q. Do you understand if you cannot afford to hire a lawyer and you want one, a lawyer will be appointed by the court to represent you before any questioning?

A. Yes, I do.

Q. Understanding these rights, do you wish to talk to us now?

A. Yes, I do.

Q. Donald Calloway, I asked if you would agree to have your statement videotaped, is that correct?

A. Yes, it is.

Q. Mr. Calloway, I am showing you the form that you signed agreeing to have your statement videotaped. Is this it?

A. Yes, it is.

Q. And does that statement at the top read: Consent to Videotape Statement?

Q. Yes, it does.

Q. Donald, how old are you?

A. I'm 64 years old.

Q. Where are you currently living?

A. 932 North St. Louis, Chicago, Illinois.

Q. Who do you live there with?

A. My wife and two kids.

Q. How old are your kids?

A. One and three.

Q. How long have you lived there for?

A. Approximately three years now.

Q. Are you employed?

A. Yes, I am.

Q. What do you do for a living?

A. I'm an independent contractor and a real estate agent.

Q. How far did you go in school?

A. About a year and a half in college.

Q. Do you remember what college that was?

A. Southeast Junior.

Q. And do you remember what high school you went to?

A. Wells High School.

Q. Okay. Donald, I want to talk to you about Margie Murray. How did you know Margie Murray?

A. We were married and we had a business together.

Q. How long were you married for?

A. Approximately nine years.

Q. You said you had a business together, what was that business?

A. Pet shop. We had two pet shops called Pet's Love People.

Q. And where were those located?

A. One was at 1850 East on 87th Street. The other one was on 71st and Jeffery. I don't recall the exact location.

Q. Okay. Do you recall when or about you were divorced from Margie?

A. No.

Q. Okay. Do you -- was it in the 70's, do you remember?

A. I don't really recall because I wasn't aware of the divorce at the time.

Q. Okay. When -- do you recall what year you were married in?

A. I think it was '71.

Q. Okay. Now, Donald, I'm gonna direct your attention to about March 20th of 1979, at around 6:00 o'clock -- between 6:00 o'clock, 6:45 p.m., did you go to a bar in Chicago?

A. Yes, I did.

Q. Okay. And did you -- once you got to the bar did you talk to anybody or call anybody?

A. I spoke with Margie at the bar.

Q. Okay. And what did you ask of Margie?

A. We just had a general conversation in the bar about how we each were doing.

Q. Okay. Did you -- before you had the conversation with Margie in the bar, did you ask her if she would come to the bar or did you guys go to the bar together?

A. No, I -- if I'm not mistaken I called her earlier and asked her to meet me at the bar.

Q. And did she do that?

A. Yes.

Q. How long were the two of you at the bar for?

A. Approximately 20 minutes, I guess, 15, 20 minutes.

Q. And did you have any sort of argument at the bar?

A. No, not that I recollect.

Q. Do you remember what you were discussing at all?

A. We started off with a general conversation to -- about the business, about our relationship with other.

Q. Were you living with Margie at this time?

A. No, I wasn't.

Q. Who were you living with?

A. If I'm not mistaken, at that time I was living with my dad.

Q. And where does your dad -- where did your dad live?

A. 4508 South Indiana.

Q. And was it just you and your dad?

A. I think my uncle was staying there also.

Q. Okay. Now, were you employed at this time?

A. I believe so.

Q. Okay. Do you remember what you might have been doing?

A. Driving a catering truck at that time.

Q. Okay. Now, how long did you and Margie stay at the bar for?

A. Approximately 15 or 20 minutes, maybe a few minutes a while longer.

Q. Did you leave the bar together?

A. Yes, we did.

Q. Where did you two go when you left the bar?

A. We left the bar and went directly to the van.

Q. Whose van was that?

A. Margie's van.

Q. Do you remember what that van looked like at all?

A. Just that it was green and white.

Q. Okay. Did both of you get in the van?

A. Yes, we did.

Q. Who was driving?

A. Margie was driving.

Q. Were you in the passenger seat?

A. Yes, I was.

Q. Was there anybody else in the van?

A. Not to my knowledge, no.

Q. What if -- where did you guys go?

A. We drove a few blocks and parked and started a conversation, started talking again.

Q. Okay. Were you guys talking the whole time?

A. Yes.

Q. Okay. And you said that you drove a few blocks and parked, why did you park?

A. We just wanted to finish our conversation.

Q. What -- do you remember what you were talking about?

A. We're talking about getting back together again, about the business.

Q. And about how long was this taking place for?

A. The entire conversation, I'd say about 20 minutes, half an hour maybe.

Q. Okay. At some point did the two of you have an argument in that van?

A. Yeah, several points that we had an argument.

Q. When the first time you had an argument in that van?

A. I think maybe about after we were parked about 5 or 10 minutes.

Q. Do you remember what that argument was about?

A. As far as I can reco -- recollect it was about us getting back together again and about me and other woman.

Q. Okay. And who started that argument?

A. Margie started the argument.

Q. Was she yelling -- were your voices raised at all?

A. Yes.

Q. Okay. And about how long did this last for?

A. The entire argument, I'd say about 20 minutes.

Q. Okay. And at any point during that argument did anyone push or touch one another?

A. Yes, Margie started pushing me and I was just trying to restrain her and I probably pushed her back on several occasions.

Q. What, if anything, happened after that and during the argument?

A. I, I explained to Margie how miserable things were, you know, and she, she made a comment to

something about, I'll put you out of your misery and reached into her purse and pulled out- a weapon.

Q. Do you remember where her purse was?

A. No, I don't remember exactly where it was.

Q. When she pulled out that gun what did she do with it?

A. She pointed it at me and waved it several times.

Q. Do you remember what that gun looked like?

A. No.

Q. Do you remember what Margie's purse looked like?

A. No.

Q. Had you ever seen Margie with a gun before?

A. No, not, not to -- not that I can remember.

Q. Now, you said that Margie pointed the gun, where was she pointing the gun?

A. Directly at me.

Q. What did you do?

A. I, I argued with her for, I guess, for a couple seconds and then reached and grabbed the gun and tried to take it away or turn it away from me.

Q. Where did you touch the gun?

A. I, I imagine I touched the gun on the barrel and the, and the hand or over her hand holding the grip.

Q. And what did you do? How did you try to get it away?

A. I, I immediately tried to turn it away from me towards the front of the van, towards the window.

Q. And were you successful?

A. Yes.

Q. Okay. What happened with the gun then?

A. We continued to struggle and eventually the, the weapon ended up pointing at Margie and it discharged.

Q. And it discharged. Where did it hit Margie?

A. In the head, I think.

Q. Okay. And do you know how that gun discharged?

A. No.

Q. Okay. After the gun discharged what did you do?

A. I panicked and started screaming and hollering and I tried to reach to see if there was any pulse or anything on Margie.

Q. Was there a pulse on Margie?

A. I really couldn't tell because there was so much blood.

Q. Where was the blood coming from?

A. I don't know. I guess from where -- from -- in her head, I guess.

Q. And what did you do then?

A. I took her out of the driver seat and laid her down and tried to take her pulse again. And I couldn't feel a pulse or anything.

Q. What did. you do with her then?

A. I started the van up and drove in a panic state.

Q. What did you do with Margie's body? Was it in the van or did you leave it on the street?

A. I left her by the -- somewhere south of where we were.

Q. Okay. Did you drive her body somewhere?

A. Yes, I drove her bod

Q. Okay. And do you remember where you drove her body to?

A. No.

Q. Okay. What did you do with her body?

A. I took her body out of the van.

Q. And do you remember where you put it?

A. No

Q. What type of area it was, was it a vacant area?

A. I think it was.

Q. Okay. And after you took her body and put it there, what did you do?

A. Then I started -- I got back on the road and started driving again.

Q. Okay. And where did you drive to?

A. I, I eventually ended up in Texas.

Q. Do you remember what you did with the gun?

A. No.

Q. Do you remember what you did with Margie's purse?'

A. No, I don't remember. But I was told I threw it out of the window somewhere.

Q. Okay. You don't remember that?

A. Not directly, no.

Q. Okay. You stated that you drove to Texas?

A. Yes.

Q. Had you been staying in Texas prior to this date?

A. A few years prior to that date, yes.

Q. Okay. And where at in Texas had you been staying?

A. I don't remember the location of, of the property. It was just a -- an area close to where I had previously worked at.

Q. And it was Margie's van that you drove to Texas?

A. Yes, it was.

Q. Do you remember about how long you stayed in Texas for?

A. A day or two, I think.

Q. And then where did you go?

A. I came back to Chicago.

Q. How did you get back to Chicago?

A. On a Greyhound bus.

Q. What did you do with Margie's van?

A. I left it there at the apartment complex in Texas.

Q. Okay. When you came back to Chicago, did you change your name?

A. Eventually, yes.

Q. What did you change your name to?

A. Robert Ducks.

Q. Okay. And why did you do that?

A. My dad advised me to.

Q. Okay. And do you know why he advised you to change your name?

A. Well, he, he said, that someone might, you know, that they might be looking for me.

Q. And were you concerned about that?

A. Yes, I was concerned.

Q. Why were you concerned about that?

A. I didn't want to go to jail.

Q. Okay. And why did think you might go to jail?

A. I just thought that, you know, that I might have been convicted of, of bodily harm to her.

Q. Okay. Now, at some point did you inquire of someone that you knew if there was a warrant out for your arrest?

A. Yes, I did.

Q. When did you do that, if you remember?

A. I'd say a year or so later.

Q. Okay. And why did you do that?

A. Because I was concerned that no one had, no one had, in my opinion, had been around looking for me.

Q. You were concerned that people might be?

A. Yes.

Q. Okay. Donald, how have you been treated by the police since you've been here?

A. Very well.

Q. Have you been allowed to eat?

A. Yes.

Q. And you've been allowed to smoke?

A. Yes.

Q. Have you been allowed to use the washroom and sleep when you wanted to?

A. Yes.

Q. Donald, has anyone made any threats or promises to you to get you to talk to me?

A. No.

Q. Okay. And are you under the influence of alcohol or drugs right now, Donald?

A. No, I'm not.

Q. This now concludes the statement of Donald Calloway.

Appendix M

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speed and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.